No. 92-1074-CFX   Title: John Hancock Mutual Life Insurance Company, Petitioner
v.
Harris Trust and Savings Bank, as Trustee of the Sperry Master Retirement Trust No. 2

Docketed:
December 22, 1992

Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Dec 22 1992	Petition for writ of certiorari filed.
	Jan 21 1993	Brief amicus curiae of American Council of Life Insurance filed.
	Jan 21 1993	Brief amicus curiae of State of New York filed.
	Jan 21 1993	Brief of respondent Harris Trust and Savings Bank in opposition filed.
	Jan 21 1993	Brief amicus curiae of National Association of Insurance Commissioners filed. VIDED.
	Jan 27 1993	DISTRIBUTED. February 19, 1993
	Feb 22 1993	Reply brief of petitioner filed.
	Feb 24 1993	REDISTRIBUTED. March 19, 1993
	Mar 22 1993	Petition GRANTED.
		**
	Apr 13 1993	Record filed.
	Apr 27 1993	Order extending time to file brief of petitioner on the merits until May 20, 1993.
	May 13 1993	Record filed.
	May 19 1993	Brief amicus curiae of Life Insurance Council of New York filed.
	May 20 1993	Brief of petitioner John Hancock Mutual Life Insurance Company filed.
	May 20 1993	Appendix to brief for the petitioner on the merits filed.
	May 20 1993	Joint appendix filed.
	May 20 1993	Brief amici curiae of State of New York, et al. filed.
	May 20 1993	Brief amicus curiae of American Council of Life Insurance filed.
	May 20 1993	Brief amicus curiae of United States filed.
	Jun 2 1993	Order extending time to file brief of respondent on the merits until July 9, 1993.
	Jun 4 1993	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 21 1993	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jul 9 1993	Brief amici curiae of American Association of Retired Persons, et al. filed.
	Jul 9 1993	Brief amici curiae of Certain United States Senators and Representatives filed.
	Jul 9 1993	Brief of respondent Harris Trust and Savings Bank filed.
	Jul 10 1993	Brief amicus curiae of Western Conference of Teamsters Pension Trust Fund filed.
	Aug 6 1993	CIRCULATED.

No. 92-1074-CFX

Entry	Date	Proceedings and Orders
	Aug 9 1993	Reply brief of petitioner filed.
	Aug 16 1993	SET FOR ARGUMENT TUESDAY, OCTOBER 12, 1993. (3RD CASE).
	Oct 12 1993	ARGUED.

92-1074

No. 92

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 22, 1992

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Question Presented

Whether the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, apply to any of the assets held in the General Accounts of insurance companies under group annuity contracts issued to pension plans that provide for guaranteed benefits.

Parties

The parties to the action below were petitioner John Hancock Mutual Life Insurance Company ("Hancock"); respondent Harris Trust and Savings Bank ("Harris Trust"); counterclaim defendant Chase Manhattan Bank, N.A. ("Chase"), which was succeeded as trustee of the Sperry Master Retirement Trust No. 2 on October 1, 1987, by Harris Trust; and third-party defendants Sperry Corporation ("Sperry") and The Retirement Committee of Sperry Corporation ("Sperry Retirement Committee").

Hancock is a mutual insurance company; it does not have any parent companies or subsidiaries to list pursuant to Rule 29.1.

In 1986, Sperry merged with Burroughs Corporation and became Unisys Corporation ("Unisys"). The Sperry Retirement Committee was succeeded by the Unisys Pension Investment Review Committee. Hancock is informed and believes that shares of Unisys and shares of Chase are publicly traded. Additionally, petitioner is informed and believes that Harris Trust is acting as a party only in its capacity as trustee of the Sperry Master Retirement Trust No. 2 and is not otherwise affected by the outcome of this litigation, and that the Bank of Montreal is a parent of Harris Trust.

Hancock is not aware of any other parent companies or subsidiaries to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Hancock Mutual Life Insurance Company ("Hancock") respectfully petitions for a writ of certiorari to review so much of the judgment of the United States Court of Appeals for the Second Circuit as (a) determined that the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), apply to certain assets held by Hancock in its General Account by virtue of the group annuity contract issued to respondent Harris Trust and Savings Bank ("Harris Trust") known as "GAC 50"[1] and (b) reversed the judgment of the United

[1] Although the original contractholder of GAC 50 was The Sperry Corporation (together with various affiliated companies), that entity has undergone

(*Footnote continued*)

States District Court for the Southern District of New York dismissing the action.

Opinions Below

The opinion of the court of appeals is reported at 970 F.2d 1138 (A-1[2]). The two opinions of the district court are reported at 722 F. Supp. 998 ("*Harris I*") (A-21), and 767 F. Supp. 1269 ("*Harris II*") (A-63); the judgment of the district court was entered on August 16, 1991 (A-89).

Jurisdiction

The judgment of the court of appeals was entered on July 30, 1992 (A-19). The court of appeals denied Hancock's petition for rehearing and suggestion for rehearing *in banc* on September 23, 1992 (A-91). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within the time allowed by law.

Statutes and Regulations Involved

The pertinent statutory provisions and regulations are set forth in the Appendix beginning at A-93.

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numerous changes in name and corporate form since 1941. For convenience, however, that entity will be referred to throughout this petition as "Sperry," and the employee benefit plan sponsored by that entity will be referred to as the "Plan." By an amendment to the contract effective May 1, 1978, the rights of the contractholder were transferred from Sperry to Chase Manhattan Bank, N.A., as Trustee of The Sperry Rand Master Retirement Trust No. 2 ("Chase"). Chase, acting in its capacity as trustee of the Plan, was originally the named plaintiff in this lawsuit. As of October 1, 1987, Chase was replaced as trustee by Harris Trust and Savings Bank ("Harris Trust"), and Harris Trust has been substituted as plaintiff in place of Chase. Chase and Harris Trust in their capacities as trustee are referred to herein as "Harris Trust."

[2]References to pages of the Appendix are cited as "A-", followed by the page number.

Statement of the Case

Hancock seeks review of a decision of the Court of Appeals for the Second Circuit that has construed the fiduciary responsibility provisions of ERISA to apply to routine insurance company business practices that have historically been subject solely to state regulation. The Second Circuit decision is in direct conflict with a recent decision of the Third Circuit on precisely the same issue and also conflicts with 18 years of consistent administrative pronouncements on that issue by the Department of Labor ("DOL"), the agency charged by Congress with implementing and enforcing ERISA. The Second Circuit's decision, which would create dual and conflicting regulation of the business of insurance under state and federal law, has caused substantial confusion and uncertainty in the insurance industry and threatens disruption of longstanding insurance company business practices.

Insurance companies hold in their General Accounts billions of dollars that have been paid as premiums under group annuity contracts issued to ERISA-regulated pension plans. These premiums have been combined in their General Accounts with the premiums received by them under other types of insurance contracts, such as individual and group life, health and disability policies, and these commingled funds have been invested and reinvested by insurers on an undifferentiated basis in various types of assets. General Account assets are an insurance company's general corporate assets and are used to pay its costs of operation and support all its obligations to its policyholders and other creditors.

An insurance company's obligations to its policyholders, as well as the administration and management of its General Account, are governed by contract provisions and state insurance laws and regulations. An insurance company is not a fiduciary at common law to its pension plan or other policyholders.

The Second Circuit held in this case that an insurance company's General Account is subject, in certain circumstances, to

ERISA's fiduciary duty rules. ERISA contains a complex set of rules governing the conduct of a fiduciary, including the obligation that a fiduciary

> discharge his duties with respect to a plan solely in the interest of the [plan's] participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries. . . .

29 U.S.C. § 1104(a)(1). (A-94) Under ERISA, a fiduciary is any person who "exercises any discretionary authority or control respecting management or disposition" of a pension plan's assets. 29 U.S.C. § 1002(21)(A). (A-93) An insurance company is not a fiduciary to a pension plan under ERISA unless the insurer has discretionary authority or control over the plan's assets.

Congress failed to define the term "plan assets" in ERISA, a significant omission later addressed by the DOL. In ERISA's "guaranteed benefit policy" exception, however, Congress expressly provided that assets held by an insurance company under a "policy or contract that provides for benefits the amount of which is guaranteed by the insurer" will not be deemed to be plan assets:

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. . . .
>
> * * *
>
> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

29 U.S.C. § 1101(b)(2). (A-94) Under that exception, to the extent that an insurer has issued a contract that provides for guaranteed benefits, the funds held by the insurer under the contract are deemed not to be "plan assets," and ERISA's fiduciary provisions do not apply.

In this case, the Second Circuit acknowledged that GAC 50 is a group annuity contract that provides for guaranteed benefits and that, in part at least, it comes within the "guaranteed benefit policy" exception (A-8). The court concluded, however, that the exception would not apply to the extent that any assets held by Hancock under the contract are "not referable to guaranteed benefits" (A-14). To that extent, according to the court, GAC 50 does not come within the exception, and Hancock has fiduciary duties under ERISA with respect to the administration and management of those assets (A-10).

The Second Circuit's ruling is erroneous, because it is contrary to the statute's language, Congress' intent and the DOL's longstanding interpretation. In addition, the court's decision, as a practical matter, is incapable of implementation. First, Hancock's commingled General Account assets are not referable to or identifiable with any particular policy or contract, or any part of a policy or contract; if Hancock is subject to ERISA fiduciary duties with respect to any of its General Account assets, it is, in effect, subject to ERISA duties as to all those assets. Second, General Account assets held by Hancock in connection with GAC 50 cannot be segregated or separated from the General Account without violating the express terms of GAC 50, which require that the funds under the contract be placed in the General Account. Third, requiring Hancock to act with regard to any General Account assets "solely in the interest of" a particular contractholder would cause it to violate state law requirements that it deal fairly and equitably and in a nondiscriminatory manner with respect to all policyholders.

1. **The Contract at Issue.**

GAC 50 is a common type of General Account group annuity contract issued to pension plans. In consideration of premiums

paid by the plan, the insurance company guarantees unconditionally that it will pay pension benefits to specified plan participants in fixed amounts determined by the plan.[3] To the extent that the premiums paid to the insurer, combined with any income or dividends allocated to the contract, exceed the cost of the benefits that the contractholder has directed the insurer to provide, the contractholder may elect to have the insurer provide additional guaranteed benefits.[4]

The premiums paid by a contractholder – in this case, Harris Trust – under a General Account group annuity contract become part of the insurer's General Account. The guarantees provided by the insurer under the contract are backed by the entirety of the assets in its General Account, which consists of all the company's commingled corporate funds and assets (with the exception of certain Separate Account assets that are not at issue here[5]). The General Account is available to satisfy all of the company's obligations to policyholders, including all individual

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[3] Typically, pension plan participants are entitled to receive fixed monthly benefit payments from the plan, which may be paid directly by the plan. If a pension plan enters into a group annuity contract with an insurance company, however, the insurer, in exchange for the premiums, will guarantee, and pay, the benefits to the designated plan participants. Under GAC 50, Hancock's guarantee of payment would not be affected or terminated even if (i) there were a subsequent breach of the contract by Harris Trust or (ii) the funds held in connection with the contract were insufficient to provide the benefits Hancock was obligated to pay. Although GAC 50 was amended on a number of occasions, Hancock's guarantees to plan participants and beneficiaries under the contract have not changed in any way.

[4] If such an excess exists, the contract may colloquially be said to have "free funds" (A-5).

[5] An insurance company Separate Account is a segregated fund or pool of assets established pursuant to contract with one or more customers, including, typically, employee benefit plans. *See* 29 U.S.C. § 1002(17). Under Separate Account arrangements, assets held are invested separately, and the results of the investments are passed through to the customer directly, sometimes in the form of variable annuity benefits.

and group life, health, disability and annuity contracts. None of these assets is segregated, identified with or attributable to any particular contract or obligation. An insurance company's General Account is also its business operating account. General Account funds comprise all of the funds (and the only funds) available to the company for the conduct of its routine business activities, such as the payment of salaries, rent, taxes and other ordinary business expenses.

Contracts like GAC 50 are "participating" contracts, *i.e.*, they share, or "participate," in the investment experience of the General Account by receiving through complex income allocation formulas a portion of the General Account's net investment income. In part, therefore, participating contracts are allocated income on the basis of the return realized by the insurance company on its General Account investments as a whole.

Integral to the insurance relationship embodied in General Account contracts are the transfer of risk from the policyholder to the insurer and the spreading of that risk among a vast number of insurance customers. The premiums paid by those customers are pooled by the insurance company in its General Account and are invested to achieve the greatest possible return, consistent with investment safety and the requirements of applicable state insurance laws and regulations. The aggregate of all these invested premiums then stands behind all the insurer's obligations. The policyholders, of course, do not have any specific assets associated with or referable to their respective policies, to any portion of these policies, or to any specific benefits provided under the policies. Instead, they have contractual rights *vis-à-vis* the insurer that are supported by all the assets of the company's General Account.

Through the pooling of premiums, pension plans and other purchasers of insurance contracts are able to transfer and share risk among themselves in exchange for a guarantee of benefits and other contractual guarantees. Because the pooled assets in the General Account are available to satisfy all of those obligations, the insurer is able to underwrite policies that guarantee

a result acceptable to all policyholders, with no one policyholder suffering the adverse results that would surely confront some of their number if all were to stand alone.

2. Harris Trust's Claims.

In its original complaint, Harris Trust alleged some 13 causes of action, which sounded generally in common law breach of contract and common law breach of fiduciary duty, relating to Hancock's administration of GAC 50. No mention was made of ERISA. Almost one year later, Harris Trust amended its complaint to allege, as its first cause of action, that all of Hancock's conduct previously alleged to have violated Harris Trust's rights at common law also violated ERISA.* Harris Trust's 13 common law causes of action were reasserted in the amended complaint, with minor revisions. The relief demanded in the amended complaint was in all substantial respects identical to that sought in the original complaint.

Throughout the lawsuit, Harris Trust offered veritable laundry lists of wrongs Hancock had allegedly committed in violation of the common law and ERISA, including breach of various provisions of GAC 50. The heart of Harris Trust's case, however, involved a challenge to a plethora of Hancock's business policies and practices. In general, Harris Trust's ERISA allegations centered on claims that Hancock had breached its fiduciary duties by its failure to administer its General Account "solely in the interest of" the Plan. Harris Trust claimed, for example, that Hancock's investment decisions (including its use of General Account assets to invest in its home office building), its method of allocating income earned on the assets in its General Account, and its determinations regarding dividends were improper because they were not undertaken solely to benefit GAC 50.

* The amended complaint alleged jurisdiction in the district court based upon 28 U.S.C. §§ 1331 and 1332, and 29 U.S.C. § 1132. Jurisdiction was originally alleged solely on the basis of 28 U.S.C. § 1332.

Hancock denied that it had breached any provision of GAC 50 and maintained that it had no fiduciary duties either at common law or under ERISA with regard to GAC 50 or the operation of its General Account. Hancock also argued that it was not subject to ERISA's fiduciary provisions, because GAC 50 is a "guaranteed benefit policy" within the meaning of 29 U.S.C. § 1101(b)(2). (A-94)

3. The District Court's Two Decisions.

Following the completion of discovery in the district court, the parties submitted cross-motions for partial summary judgment, based upon an agreed statement of facts, addressed solely to the applicability of ERISA to the claims asserted by Harris Trust. In *Harris I*, Judge Patterson held that Hancock is not a fiduciary with respect to assets held in its General Account under GAC 50, because the contract in its entirety comes within the "guaranteed benefit policy" exception, and dismissed all of Harris Trust's purported ERISA claims (A-61 to A-62). Hancock then moved for summary judgment dismissing all of Harris Trust's common law claims. In *Harris II*, Judge Patterson granted that motion (A-63), and final judgment was thereafter entered dismissing the action in its entirety (A-89).

4. The Second Circuit Decision.

In its appeal to the Second Circuit, Harris Trust sought reversal of the district court's conclusion that ERISA's fiduciary provisions did not apply to its claims. With one exception, it abandoned on appeal all its common law claims (A-2 to A-3). The court of appeals, in all respects but one, affirmed the lower court judgment (A-2).

In reversing the district court, the court of appeals first held (A-8) that GAC 50 is a "guaranteed benefit policy" within 29 U.S.C. § 1101(b)(2). The court further held, however, that the contract came within the exception only with respect to assets "referable to guaranteed benefits" (A-14) and that assets not so "referable" (*i.e.*, the so-called "free funds") were assets of the Plan as to which Hancock was to be considered an ERISA

fiduciary (A-14). The court also determined that Hancock was not a fiduciary in exercising its contract rights under GAC 50 (A-13) and that Hancock had not breached GAC 50 as a matter of common law (A-13 to A-14).

The Second Circuit identified the principal issue to be whether the existence of "free funds" affected GAC 50's status as a "guaranteed benefit policy" (A-8). The court held that, to the extent that "free funds" are not immediately required to guarantee benefit payments to Plan participants (though they could be used for that purpose in the future) and because they are subject to fluctuation based upon the insurer's investment performance, Hancock has ERISA fiduciary duties with respect to the administration and management of such funds (A-10 to A-11).

The Second Circuit took note of the recent decision of the Third Circuit in *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), in which that court held that a contract similar to GAC 50 in its essential terms was a "guaranteed benefit policy" in its entirety, because the contract "made provision for 'guaranteed benefits to plan participants at some finite point in the future'" (A-11). Although GAC 50, like the contract in *Mack Boring*, provided that "free funds" could be used by Harris Trust to require the future payment of additional guaranteed benefits, the Second Circuit rejected the reasoning of the Third Circuit on this point. Instead, it relied upon an earlier Seventh Circuit decision, *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), which held that an insurance contract could not be a guaranteed benefit policy unless it provided for a fixed rate of investment return (A-9 to A-10). Having concluded that there are "no guarantees" with regard to the "free funds" under the contract and that GAC 50 does not provide for a fixed rate of return, the Second Circuit held that Hancock "should be subject to fiduciary responsibility" (A-10).

Reasons for Granting the Writ

The Second Circuit decision in this case conflicts squarely with the Third Circuit's decision in *Mack Boring*. It also contradicts the DOL's longstanding interpretation of the statute, *viz.*, that funds placed in an insurance company's General Account "shall not be considered plan assets" (A-96), and creates a conflict between federal and state law.

Assets in an insurance company's General Account are available to satisfy all the company's obligations to its policyholders and creditors. To assure that General Account assets are invested prudently and that insurers deal evenhandedly with all classes of policyholders, the States, in accordance with the national policy underlying the McCarran-Ferguson Act (A-93), have developed a broad framework of insurance company regulation. The Second Circuit decision, however, obligates insurers to manage at least some General Account assets for the exclusive benefit of some policyholders.

The Second Circuit holding has created profound uncertainty concerning the legal standards that will govern the administration and management of vast amounts of insurance company assets. Pension plans throughout the nation have paid hundreds of billions of dollars to insurers under participating General Account contracts indistinguishable from the contract at issue here. Companies like Hancock, which transact business nationwide, cannot now anticipate whether their routine business practices will be judged by standards set by the Second Circuit, the Third Circuit, the Seventh Circuit or, indeed, by state or federal law. As one commentator has observed, the Second Circuit decision "could affect the investment of all the assets held in insurance company general asset accounts" and "leaves the legal terrain pitted with uncertainty."[7]

[7] Chernoff, *Appeals Court Ruling Clouds Insurance Issue*, Pensions & Investments 31 (Aug. 17, 1992). Counsel for Harris Trust has remarked that "he would expect the insurance industry to be 'extraordinarily concerned' about the ruling." *Id.* Another practitioner has noted that application of ERISA's fiduciary standards to the insurance industry "could create 'incredible

(Footnote continued)

I.

THERE EXISTS A CLEAR CONFLICT AMONG THE CIRCUITS

The decisions of the court below, the Third Circuit in *Mack Boring* and the Seventh Circuit in *Peoria Union* present fundamentally different interpretations of the "guaranteed benefit policy" exception. The Second Circuit held that a group annuity contract is not a "guaranteed benefit policy" to the extent that there are "free funds" under the contract. In contrast, the Third Circuit held that a contract with "free funds" is a "guaranteed benefit policy" in its entirety so long as it "'provided' guaranteed benefits to plan participants at some finite point in the future." 930 F.2d at 273. The Seventh Circuit posits a wholly different standard: an insurance contract is a "guaranteed benefit policy" only if the insurance company has guaranteed a "fixed payout" to the contractholder. 698 F.2d at 327.[8] These starkly different views of the exception cannot be reconciled.

The Third Circuit properly understood the plain meaning of 29 U.S.C. § 1101(b)(2) and Congress' intent to exempt General Account contracts from ERISA's fiduciary requirements. Unlike the Second Circuit, that court correctly refused to construe the "to the extent that" language of the exception so as to impose fiduciary duties with respect to some, but not all, General Account assets held under a guaranteed benefit policy. *Mack Boring*, 930 F.2d at 274. It analyzed the relationship of the sentences in section 1101(b)(2) to give meaning to the whole section and concluded that the "to the extent that" language was intended to distinguish between contracts that provide variable benefits

conflicts of interest'" and "is going to be a major setback for the insurance industry." Greenwald, *Ruling May Widen Insurers' Liability for Pension Assets*, Business Insurance 30 (Aug. 10, 1992).

[8] Upon rehearing in *Peoria Union*, the Seventh Circuit acknowledged that there were a "number of arguments" that ERISA did not apply to the contract at issue that the court had not previously considered and noted that they could be presented to the district court on remand. *Id.* at 328. *Cf. Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 566-67 (7th

(Footnote continued)

through a Separate Account and those that provide for guaranteed benefits through the insurer's General Account. *Id.*

Moreover, the Third Circuit examined the legislative history of ERISA and found that it confirmed that section 1101(b)(2) was meant to address the inherent and intractable difficulties that would arise from imposing ERISA's fiduciary duties on the management of General Account assets. In contrast, neither the Seventh nor the Second Circuit gave any consideration to the consequences of applying those duties to General Account operations, and neither addressed the conflict between federal and state law that would inevitably result. Furthermore, neither court understood or gave sufficient weight to the DOL's consistent interpretation of the exception, first stated in Interpretive Bulletin 75-2, 29 C.F.R. § 2509.75-2 (1991) ("IB 75-2") (A-96), which was published in February 1975, shortly after ERISA's enactment.[9]

Because virtually all major insurance companies operate on a nationwide basis and have entered into group annuity contracts in all 50 states, the conflicting circuit court holdings confront insurers with enormous uncertainty regarding their obligations under existing contracts and in relation to the ongoing conduct of their pension-related General Account operations.

Cir. 1991) (insurance contract is a guaranteed benefit policy where insurer annually announced interest rate in advance and allowed the plan to withdraw its funds), *cert. denied*, 112 S. Ct. 1182 (1992).

[9] IB 75-2 was the DOL's first major interpretive pronouncement under ERISA. *See* 40 Fed. Reg. 31,598-99 (July 28, 1975).

II.

THE SECOND CIRCUIT DECISION CONTRADICTS 18 YEARS OF CONSISTENT REGULATORY INTERPRETATION OF THE STATUTE BY THE DEPARTMENT OF LABOR

The Second Circuit impermissibly substituted its own construction of ERISA for that of the DOL, the agency charged by Congress with its implementation. *See* 29 U.S.C. § 1135. In every instance when it has had occasion to address this issue, the DOL has consistently adhered to the view that, under the "guaranteed benefit policy" exception, funds held in insurance company General Accounts do not constitute "plan assets." That view was first stated in IB 75-2 (A-96):

> If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered plan assets.

Three years later, the DOL reiterated its interpretation that "assets held in an insurer's General Account to support benefits under a contract purchased by a plan are not plan assets . . . ." 44 Fed. Reg. 50,363, 50,364 n.4 (1979). Thereafter, the DOL continued to express that view.[10] In 1986, the DOL published

[10] For example, in connection with the Proposed Regulation Relating to the Definition of Plan Assets, the DOL stated:

> With respect to most investments, the assets that a plan is considered to have acquired by reason of an investment are determined by reference to the terms of the instrument and applicable non-ERISA law. This general principle was first recognized by the Department in Interpretive Bulletin 75-2, which states that, generally, investment by a plan in securities of a corporation of [sic] partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets."

(Footnote continued)

a final regulation dealing with the definition of "plan assets" in which it reaffirmed its consistently held view. *See Proposed Final Regulations Relating to the Definition of Plan Assets*, 51 Fed. Reg. 41,262 (Nov. 13, 1986) (A-105), codified in 29 C.F.R. § 2510.3-101 (A-99). The DOL has never expressed a contrary view in any of its public pronouncements, nor has it ever sought to compel insurers to comply with ERISA's fiduciary rules in connection with their General Account contracts or operations.

Ignoring the DOL's consistency in its interpretation and enforcement of the statute, the Second Circuit, without meaningful analysis, concluded that there was "confusion" in the DOL's published releases. Despite the overwhelming evidence of consistent interpretation, the court of appeals misconstrued and misapplied two DOL Advisory Opinions, Advisory Opinions 83-51A (September 21, 1983) and 78-8A (March 13, 1978), that, it said, were "seemingly contradictory" to IB 75-2 (A-11 to A-12).[11] In fact, those opinions did not relate at all to General Account contracts.[12] *Mack Boring*, 930 F.2d at 276 n.18.

50 Fed. Reg. 961 (1985). *See also* 44 Fed. Reg. 46,365, 46,368 (1979); 45 Fed. Reg. 51,303, 51,304, 51,305 n.9 (1980); 46 Fed. Reg. 46,443, 46,444 (1981).

[11] The court of appeals compounded its error by interpreting IB 75-2 as dealing solely with prohibited transactions (A-11 to A-12). However, the DOL's references to IB 75-2 in subsequent pronouncements demonstrate that that release was intended to have broad applicability beyond the prohibited transaction context. *See Mack Boring*, 930 F.2d at 276.

[12] In Advisory Opinion 83-51A, the DOL determined that, under certain circumstances, the funds placed in a Separate Account would not be treated as "plan assets." In Advisory Opinion 78-8A, the DOL distinguished the fund at issue, which functioned like a Separate Account in that it provided variable annuity payments that were dependent upon the investment performance of the account, from a true insurance company General Account. The DOL therefore found that the account was a "Separate Account" and that the assets in the account were "plan assets." Accordingly, even a cursory review of these advisory opinions reveals that they address only Separate Account contracts, which are specifically defined in ERISA as holding "plan assets," and therefore do not in any way contradict IB 75-2. *See Mack Boring*, 930 F.2d at 276 n.18.

The permissible interpretation of a statute by the agency charged with its implementation should be given the highest degree of deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 844 (1984); *see also Rowan Companies, Inc. v. United States*, 452 U.S. 247, 251 (1981); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The DOL has consistently expressed the view that General Account assets are not "plan assets," and the insurance industry has justifiably relied on that interpretation. The Second Circuit should have deferred to that permissible and correct construction.

III.

THE SECOND CIRCUIT DECISION IGNORES CONGRESS' ALLOCATION OF RESPONSIBILITY FOR REGULATING THE BUSINESS OF INSURANCE TO THE STATES

General Account investments and operations have long been subject to a plethora of state laws — laws that expressly regulate the insurance company practices challenged by Harris Trust as violations of ERISA.[13] For example, these laws limit the types of investments that can be made with General Account assets and require the diversification of investments and the maintenance of reserves. *E.g.*, N.Y. Ins. Law §§ 1402, 1403, 1409 (McKinney 1985); Mass. Gen. L. Ann. ch. 175 § 66B (West 1987 & Supp. 1992) (authorizing the use of General Account assets to invest in home office properties). Similarly, an insurer's allocation of income and expenses within its General Account is specifically regulated by state insurance departments, which, in Hancock's case, have endorsed its "investment year method" for distributing net investment income. *See* N.Y. Insurance

[13] In its motion for summary judgment in *Harris I*, Hancock identified the various state laws that governed Hancock's business practices alleged by Harris Trust to violate ERISA. In its opinion (A-31 n.10), the district court noted that: "Harris Trust concedes that each of the laws relates to employee benefit plans and that most of them probably regulate the business of insurance."

Department Regulation No. 33, N.Y. Comp. Codes R. & Regs. tit. 11, § 91.1 *et seq.* (1992). Furthermore, both the payment of dividends and the determination of the amount of divisible surplus available to be paid to an insurance company's policyholders have traditionally been matters subject to exclusive state regulation. *See, e.g.*, Mass. Gen. L. Ann. ch. 175 § 93E (West 1987).

At common law, an insurance company is not a fiduciary to its policyholders.[14] In contrast to ERISA's "solely in the interest of" standard, state insurance laws require that General Account assets be administered to spread risk fairly and equitably among all life, health, employee benefit and other contractholders whose contract rights are supported by such accounts. *E.g.*, N.Y. Ins. Law §§ 2403, 2606-08, 4239 (McKinney 1985); Conn. Gen. Stat. Ann. §§ 38a-815 to -816, 38a-446 to -447, -488 (West 1987 & Supp. 1991); Mass. Gen. L. Ann. ch. 176D, §§ 2-3, 3(7), ch. 175, § 120 (West 1991); N.J. Stat. Ann. §§ 17:29B-3 to -4, 17B:30-2 to -4 (West 1985). As the Third Circuit recognized in *Mack Boring*, these state law requirements are in conflict with ERISA's fiduciary standards:

> These state-imposed duties do not mesh easily with ERISA's requirement that plan assets be managed "solely in the interest" of plan customers. Whenever an insurance company acts "solely in the interest" of a pension plan customer, it would violate state law. Whenever an insurance company takes actions to ensure that under state law, it is treating its policyholders fairly and equitably, it runs the risk of violating ERISA's fiduciary requirements.

930 F.2d at 275 n.17.

[14] *See, e.g., Benefit Trust Life Ins. Co. v. Union Nat'l Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir. 1985); *Rochester Radiology Assocs. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985); *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421, 429, 17 N.E. 363, 366 (1888).

This Court has noted on more than one occasion that, although ERISA is a comprehensive statute, it was not Congress' intent to displace in wholesale fashion separate regulatory systems established under state law. Indeed, in ERISA's pre-emption saving clause, 29 U.S.C. § 1144(b)(2)(A) (A-95), Congress expressed its specific intent that the regulation of the "business of insurance" be left to the States, as provided in the McCarran-Ferguson Act.[15] In the leading case of *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), this Court settled that issue. The Court there held that a Massachusetts law was saved from preemption under 29 U.S.C. § 1144(a), because the law regulated "insurance" within the common-sense meaning of the term, and because the regulation of the "substantive terms" of insurance contracts fell squarely within the regulation of the "business of insurance" as defined by the Court in its earlier decisions. 471 U.S. at 746-48. As the Court explained:

> The ERISA saving clause, with its similarly worded protection of any law of any State which regulates insurance, appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States.

Id. at 744 n.21.

[15] The McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, provides, in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012(a), (b). (A-93)

In *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), the Court again addressed the relationship of ERISA to the McCarran-Ferguson Act's policy of reserving the regulation of insurance to the States. Applying the analysis in *Metropolitan Life*, the Court expressly found that, when a state insurance regulation collides with ERISA, ERISA must give way to state insurance regulation. In so holding, the Court was "respectful of the presumption that Congress does not intend to pre-empt areas of traditional state regulation" and of "Congress' presumed desire to reserve to the States the regulation of the 'business of insurance.'" *Id.* at 63 (citations omitted).

In *Mack Boring*, the Third Circuit properly construed the "guaranteed benefit policy" exception as preserving traditional state authority over General Account contracts and practices. As a consequence of the Second Circuit's decision, however, insurance company General Accounts, already regulated by the insurance commissioners in each of the States, would also be regulated under ERISA. If the Second Circuit's view prevails, insurance companies will not be able to operate their General Accounts in accordance with state law to the extent that ERISA's fiduciary provisions are deemed to apply.[16]

[16] There are numerous examples of conflicts with state law and the illogical and absurd results that necessarily will follow if the Second Circuit's decision is not reversed. For example, General Account funds are customarily and, under state insurance regulations, *see, e.g.*, Mass Gen. L. Ann. ch. 175, §§ 180A-180L (West 1987 & Supp. 1992); N.Y. Ins. Law §§ 7401-34 (McKinney 1985 & Supp. 1993), lawfully used to defray corporate expenses and to meet all General Account liabilities. However, under ERISA's fiduciary responsibility provisions, it is arguably unlawful for an insurance company to apply General Account funds to such non-employee benefit payment purposes as the payment of benefits under life insurance policies, the payment of salaries to insurance company employees, the payment of rent on insurance company office space. Such absurdities are inevitable, because the ERISA fiduciary duty rules are inherently inconsistent with the concepts of pooled assets and shared risk that are fundamental to the insurance relationship.

Some of the most striking examples of the potentially bizarre consequences of applying ERISA fiduciary duties in this context are seen in Harris Trust's own arguments in this case. For example, in the district court, Harris Trust

(*Footnote continued*)

Unless reversed, the decision of the court of appeals could have a serious impact upon the nation's capital markets. At year-end 1991, over 59 million persons were covered by private pension plans having contracts with life insurance companies. Total reserves held by life insurance companies under such contracts were over $746 billion. Of that total, approximately $565 billion, or 76%, were held in insurance company General Accounts under General Account contracts like the one at issue here. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book* 54-59 (1992).

The Second Circuit decision has cast doubt on the legality of existing General Account contracts and practices and exposed the industry to a potential flood of litigation. It has created substantial uncertainty, despite the absence of any indication of a Congressional intent to impose fiduciary duties on insurers' General Account practices and the consistent interpretation of the legislation by the DOL. As the Third Circuit noted in *Mack Boring*:

> [I]f Congress had intended so severe a disruption of insurance practices, practices that had been in existence for almost three decades before the enactment of ERISA, it would have made its intention perfectly clear. After all, ERISA was expressly "designed to prevent a fiduciary 'from being put in a position where he has dual loyalties, and therefore, he cannot act exclusively for the benefit of a plan's participants and

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asserted that it is *per se* unlawful for an insurance company to place premiums received under a group annuity contract in its General Account — even though the contract expressly requires it — because under ERISA that constitutes unlawful commingling. The obligations Harris Trust would impose are entirely at odds with the essential nature of a General Account contract. If ERISA's fiduciary duty rules apply, then any insurance company conduct, though expressly permitted (or even required) under the terms of a group annuity contract, could nonetheless constitute an actionable breach of fiduciary duty if that conduct were found to disadvantage any particular pension plan contractholder in some way.

> beneficiaries.'" . . . There is no such clear indication in the legislative history of the guaranteed benefit policy exception. Indeed, the legislative history . . . points in the opposite direction.

930 F.2d at 275 n.17 (citation omitted).

IV.

THE SECOND CIRCUIT'S CONSTRUCTION OF ERISA'S "GUARANTEED BENEFIT POLICY" EXCEPTION IS ERRONEOUS

As construed by the Third Circuit, the "guaranteed benefit policy" exception exempts from fiduciary status all General Account group annuity contracts that "provide for" fixed guaranteed benefit payments. *Mack Boring*, 930 F.2d at 274. The Third Circuit interpreted the "to the extent that" language of the exception as distinguishing contracts that provide for the payment of fixed guaranteed benefits from contracts that have a Separate Account feature and provide in whole or in part for variable benefits (*i.e.*, benefits the amount of which varies depending upon the investment performance of the underlying assets). It reached that conclusion by giving effect to the second sentence of the exception, which states that assets held in Separate Accounts are "plan assets."

The Second Circuit, like the Seventh Circuit in *Peoria Union*, misread the "guaranteed benefit policy" exception. It incorrectly construed the exception to turn not only on whether benefit payments to participants are fixed, rather than variable, but also on whether a contract provides for a fixed, rather than variable, rate of return (about which the statute says nothing):

> Although Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all

> the benefits derived from the other, or free funds, portion. The non-guaranteed portion is dependent upon the insurer's investment experience and *therefore is variable with respect to the benefits it provides.*

(A-10 to A-13) (emphasis added). While the amount of the "free funds" under the contract will undoubtedly vary with the General Account's investment performance, that is also true of the funds supporting the contract as a whole. It is undisputed, however, that benefit payments to participants under GAC 50 are fixed in amount and do not vary.

Because of the Second Circuit's failure to apprehend the distinction between variable investment performance and variable benefit payments, it completely misread the only specific reference in the legislative history to the "guaranteed benefit policy" exception:

> If the policy guarantees basic payments but other payments may vary with, *e.g.*, investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5077 ("Conference Report"). It is plain that the distinction drawn by the exception is between fixed and variable benefit payments, not between fixed and variable return on investment, and that Congress' intention was to treat as "plan assets" only those assets held by insurance companies that support variable benefits (*i.e.*, assets typically held in insurance company Separate Accounts).

ERISA's legislative history clearly supports the construction of the exception adopted by the Third Circuit. The versions of ERISA passed by both the House and Senate speak in terms of a blanket exception for insurance company General Account assets, not a partial exception. The Senate bill expressly exempted General Account assets from its fiduciary provisions:

> (k) This section governing fiduciary responsibilities shall not apply to—
>
> (1) funds held by an insurance carrier unless that carrier holds funds in a separate account. . . .

S.4, 93d Cong., 1st Sess. § 511 (1973), *reprinted in* I Legislative History of ERISA at 170 (Comm. Print 1976). Although the final House bill did not contain the same language, the House bill embodied the same policy and contemplated the same result. The Senate Staff's Summary of Differences, comparing the Senate and House bills, stated: "Although the House bill does not specifically exempt these funds from the fiduciary responsibility rules, the policy of the House bill is the same."[17] There is nothing in the Conference Report to suggest that the legislation was intended to reverse that policy.[18]

Nowhere in ERISA's legislative history is there any statement by Congress that it intended ERISA's fiduciary rules to apply to insurance company General Accounts or that it intended to re-write or supplant the longstanding framework of state insurance regulation. *Mack Boring*, 930 F.2d at 275 n.17. It is not surprising, therefore, that the Second Circuit, in its analysis, did not cite to any legislative history indicating that Congress considered, or was even aware of, the possible drastic consequences to the insurance industry of applying ERISA's fiduciary rules to the billions of dollars held by insurance companies in

[17] Summary of Differences Between the Senate Version of H.R. 2, pt. 3, 94th Cong., 2d Sess. at 2, 3 (1974), *reprinted in* 3 Staff of Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of ERISA at 5252 (Comm. Print 1976).

[18] Both the Standing Rules of the Senate and the Rules of the House of Representatives provide that a joint Senate and House conference committee is prohibited from striking provisions that have been agreed upon by both chambers. Standing Rules of the Senate, Rule XXVIII, §2; Rules of the House of Representatives, Rule XXVIII, §3. Thus, the legislation as enacted must be construed to incorporate both chambers' intent.

their General Accounts. If Congress had intended to change the existing scheme of state regulation, those changes would surely have been discussed at some stage of the legislative deliberations. *Id.* ("we do believe that if Congress had intended so severe a disruption of insurance practices . . . it would have made its intention perfectly clear"). The complete absence of any such discussion is itself eloquent testimony that no such change was intended. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Watt v. Alaska*, 451 U.S. 259, 271 n.3 (1981).

Conclusion

For all the above-stated reasons, the Court should issue a writ of certiorari as prayed for herein to review the judgment of the United States Court of Appeals for the Second Circuit.

December 22, 1992

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 970 F.2d 1138 (2d Cir. 1992)

HARRIS TRUST AND SAVINGS BANK,
as Trustee for the Sperry Master Retirement
Trust #2, Plaintiff-Appellant,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,
Defendant-Appellee.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Third-Party Plaintiff,

v.

CHASE MANHATTAN BANK, N.A.,
Counterclaim-Defendant,

and

Sperry Corporation and the Retirement Committee of Sperry Corporation, Third-Party Defendants.

No. 979, Docket 91-7854.

United States Court of Appeals, Second Circuit.

Argued Feb. 11, 1992.

Decided July 30, 1992.

Before: FEINBERG, TIMBERS and MINER, Circuit Judges.

MINER, Circuit Judge:

Plaintiff-appellant Harris Trust and Savings Bank as Trustee for the Sperry Master Retirement Trust No. 2 and its successor, the Unisys Master Trust ("Harris Trust"), appeals from a final judgment entered on August 16, 1991 in the United States District Court for the Southern District of New York (Patterson,

J.) in favor of defendant-appellee John Hancock Mutual Life Insurance Company ("Hancock"). The final judgment dismissed in its entirety the amended complaint in this action in accordance with two opinion-orders, the first granting partial summary judgment dismissing Harris Trust's claim for breach of fiduciary duties under the Employee Retirement Income Security Act of 1947 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the second granting summary judgment dismissing Harris Trust's contract and common law claims. *See Harris Trust & Savings Bank, as Trustee of the Sperry Master Retirement Trust No. 2 v. John Hancock Mutual Life Ins. Co.*, 722 F.Supp. 998 (S.D.N.Y.1989) ("*Harris I*") and *Harris Trust & Savings Bank, as Trustee of the Sperry Master Retirement Trust No. 2 v. John Hancock Mutual Life Ins. Co.*, 767 F.Supp. 1269 (S.D.N.Y.1991) ("*Harris II*").

The dispute between the parties centers upon a certain contract known as Group Annuity Contract No. 50 ("GAC 50"), originally entered into in 1941 between Hancock and Sperry Rand Corporation to fund a retirement plan for the benefit of Sperry employees. Sperry has undergone a number of changes in name and corporate form since the execution of GAC 50 but will be referred to herein by its original name. Harris Trust is the present trustee of the retirement plan and the ultimate successor to Sperry's right as contractholder of GAC 50. In *Harris I*, the district court decided that Hancock was exempt from the fiduciary responsibility provisions of ERISA in connection with the management of GAC 50 for the reason that GAC 50 is a "guaranteed benefit policy." In *Harris II*, the district court decided that there was no basis for any of the contractual and other common law claims pleaded by Harris Trust against Hancock. The sole challenge to *Harris II* raised by Harris Trust on this appeal relates to the district court's rejection of the claim that Hancock breached GAC 50 by terminating the payment of non-guaranteed pension benefits. As to the ERISA fiduciary claims disposed of in *Harris I*, Harris Trust argues here, as it did in the district court, that Hancock is an ERISA fiduciary with respect to the assets it holds under GAC 50; that Hancock is an ERISA fiduciary in respect of the contract itself; and that Hancock is in any event collaterally estopped from re-litigating

the fiduciary status issue as the consequence of an order in another case, subsequently vacated, deciding the very question presented here.

To assist us in resolving the issue of fiduciary responsibility, we solicited an *amicus* brief from the United States Department of Labor, the government agency charged with the enforcement of ERISA. The Department apparently has issued an Interpretive Bulletin, as well as two Advisory Opinions, bearing on the issue. The Bulletin is not entirely clear and appears to be in conflict with the Opinions. Following oral argument, the Clerk of the Court, at our direction, invited the submission of an *amicus* brief within thirty days of receipt of her letter dated February 12, 1992. By motion dated March 3, 1992, the Department of Labor sought an extension to May 12, 1992, asserting that the additional time (approximately three months) was needed because (1) the Secretary had not formulated a final position on the issue; (2) the case was important and complex; (3) more time was needed for an examination of legislative and regulatory history; (4) a review of the record was required; and (5) approval of the Department of Justice was required. Recognized in the moving papers was the split in circuit court authority on the issue and the Secretary's interest in promoting uniformity. We granted the requested extension.

By letter dated May 11, 1992 from Marshall J. Breger, Solicitor of Labor, we were advised as follows:

> During the time allotted by the Court, we have undertaken an extensive review of the legal and policy issues involved in this matter. Regrettably, we have concluded that the need to fully consider all of the implications of these issues within the Department precludes our providing the Court with a brief within a foreseeable time frame. Accordingly, rather than seek a further extension, I feel constrained to decline the Court's invitation.

We do not understand why the Solicitor of Labor is unable to provide an *amicus* brief "within a foreseeable time frame" and can only deplore his failure to do so in this case. While it is not unusual for a government agency to decline an invitation to file an *amicus* brief on account of bureaucratic inertia or inability to articulate a coherent policy, *see Popkin v. Bishop*, 464 F.2d 714, 719 n. 15 (2d Cir.1972); *Securities Industry Ass'n v. Connolly*, 703 F.Supp. 146, 155 n. 16 (D.Mass.1988), *aff'd*, 883 F.2d 1114 (1st Cir.1989), *cert. denied*, 495 U.S. 956, 110 S.Ct. 2559, 109 L.Ed.2d 742 (1990), it is unconscionable for an agency to request a substantial extension of time and then fail to file the promised brief. It is especially egregious to request an extension as long as that requested here and then to advise in effect that no extension would be long enough. Courts do not have the luxury of deferring decisions indefinitely, however, and we proceed to dispose of the matter before us. We reverse in part on the fiduciary duty issue and affirm on the contract termination issue.

BACKGROUND

As originally constituted on March 1, 1941, GAC 50 provided for the purchase of individual deferred annuities from Hancock for the Sperry Defined Benefit Retirement Plan. These annuities were purchased on an annual basis for each employee with premiums, or contributions, paid to Hancock by Sperry. They provided for regular payments to eligible Sperry employees or their beneficiaries following retirement. The premiums became part of Hancock's general account of corporate funds, and Hancock issued the guaranteed annuities at purchase rates fixed by the contract.

By amendment effective January 1, 1968, GAC 50 was converted from a deferred annuity form of contract to a Retrospective Immediate Participation Guarantee ("Retro-IPG") form of contract. The deferred annuities purchased prior to January 1, 1968 were technically cancelled and the assets supporting them placed in a Pension Administration Fund ("PAF"). However, the cancellation of the pre-1968 annuities did not affect the

guarantees of benefits by Hancock to the participants and beneficiaries. With respect to the Retro-IPG, net investment income was directly credited to the PAF on an annual basis. The amount credited depended upon Hancock's general account investment performance and the allocation of that performance to the PAF. Under the 1968 amendment, Hancock guaranteed that once an employee's retirement annuity has been established, Hancock is obligated to make all future payments due under the annuity. Hancock also guaranteed that the PAF on any date would not be less than it otherwise would have been if the sum of the net interest earned and capital gains and losses apportioned to the PAF had always been zero from January 1, 1968. (Hancock in effect guaranteed that the PAF would never fall below its January 1, 1968 level.) As in the case of the deferred annuity form of contract, the premiums paid under the Retro-IPG contract became part of Hancock's general corporate funds.

The 1968 amendment required that the PAF be maintained at a level sufficient to meet the Liabilities of the Fund ("LOF") as computed by Hancock. LOF is the contractual reserve for the possible future purchase of annuities for the benefit obligations guaranteed by Hancock. The specific requirement was that the PAF balance be maintained at a level at least 105 per cent of LOF. The amount in the PAF in excess of this minimum operating level ("MOL") has been referred to by the parties as "free funds." If Sperry failed to maintain Fund balances at or above MOL, termination of the PAF would be triggered. Upon termination, the contract would cease to function in the manner of a Retro-IPG, the cancelled pre-1968 annuities would be "repurchased" and the contract would function thereafter in the manner of a deferred annuity contract. For more than 20 years, the PAF balance in GAC 50 has exceeded its MOL. The 1968 amendment also established a method for the provision of additional benefits for the period after December 31, 1967: upon the retirement of an eligible employee, Hancock would determine the amount by which the LOF would increase if the portion of the retirement benefit in the period after January 1, 1968 were to be "guaranteed" by Hancock. If GAC 50's PAF balance exceeded the contractual MOL based upon the increased LOF,

Hancock would guarantee the payment of the additional benefits.

On August 1, 1977, GAC 50 again was amended. This amendment involved its conversion to a Retrospective Immediate Participation Guarantee/Prospective Deferred Liability ("Retro-IPG-PDL") form of contract. Under the amendment, the LOF would not automatically be increased upon the retirement of any employee, and new retirement benefits would not be guaranteed by Hancock. The Sperry retirement committee could request that Hancock establish guaranteed benefits in addition to those already guaranteed, but did not do so. Sperry was entitled to designate employees eligible for non-guaranteed benefits and did designate employees to receive such benefits from the free funds in the PAF. Hancock paid such benefits on a monthly basis through June of 1982, when it gave notice as provided in the contract that it would no longer pay non-guaranteed benefits under the Retro-IPG-PDL.

Contending that Hancock's elimination of the non-guaranteed benefit payments and its elimination of the "rollover" procedure (under which withdrawals of excess funds from the PAF were allowed on two occasions) left it with no means of withdrawing any of the increasing free funds without terminating the contract and causing the purchase of annuities at inflated prices, Harris Trust commenced this action on July 20, 1983. It was the Trustee's position that Hancock employed an artificially low interest assumption to calculate the LOF, resulting in: the setting of LOF at a level much higher than necessary to provide the benefits guaranteed under the contract, oversecuring Hancock and preventing termination; and a geometrically increasing level of free funds in the PAF.

Because it allegedly was denied access to the accumulating free funds over a substantial period of time, and because Hancock was said to have administered GAC 50 improperly, Harris Trust sought in the amended complaint in this action to recover the non-guaranteed benefits withheld by Hancock, the losses resulting from Hancock's breach of duties, the profits made by

Hancock using Sperry funds, and damages in an amount to be determined at trial. The complaint also sought the removal of Hancock as fiduciary, judgment enjoining Hancock from further violations of its duties, and other relief. Hancock pleaded counterclaims against Harris Trust and interposed a third-party complaint against Sperry, demanding judgment over in the event that it was found liable to Harris Trust for the breach of any common law or fiduciary duty. As previously described, the district court granted summary judgment in *Harris I* dismissing the ERISA fiduciary claims and in *Harris II* dismissing the contractual and other common law claims. The counterclaims and third-party complaint thereafter were dismissed as moot.

DISCUSSION

I. ERISA Fiduciary Status

(a) *As to Assets in General Account*

Harris Trust claims that Hancock bears fiduciary responsibilities to the Plan and its participants as to the free funds in the PAF under the provisions of ERISA. As defined in ERISA, one is

> a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management . . . or disposition of its assets . . .

29 U.S.C. § 1002(21)(A). An insurance company holding a certain type of pension fund asset in its general account escapes the definition and the concomitant duties of a fiduciary in accordance with the following provision:

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.

29 U.S.C. § 1101(b)(2). A guaranteed benefit policy is

> an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer.

29 U.S.C. § 1101(b)(2)(B).

It seems clear that, at least to the extent it provides for benefits guaranteed by Hancock, GAC 50 is a guaranteed benefit policy and Hancock does not act as a fiduciary in administering it. The question is: Do the free funds, as to which no guarantees are available, affect the status of GAC 50 as a guaranteed benefit policy excepted from the definition of plan assets? The district court answered that question in the negative:

> Each time ERISA uses the word 'benefit,' it refers to the payments made to the employees themselves. *See, e.g.*, 29 U.S.C. § 1002(7) ('"participant" means any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan'); *id* § 1002(8) (' "beneficiary" means a person designated by a participant . . . who is or may become entitled to a benefit'); *id.* §§ 1023(e), 1054, 1056, 1104(a)(1)(A)(i), 1108(c)(1). The word 'benefit' in the guaranteed benefit policy exception . . . refer[s] to benefits and payments to covered employees. Because GAC 50 provides for fixed payments to covered employees, it is covered by the guaranteed benefit policy exception.

Harris I, 722 F.Supp. at 1017-18.

We think that the district court erred in concluding that GAC 50 in its entirety is covered by the guaranteed benefit policy exception. In the plain language of the statute, a contract is a guaranteed benefit policy only "to the extent that" it provides for benefits that an insurer guarantees. Although Hancock provides guarantees with respect to one portion of the benefits

derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides. Legislative history supports the view that the free funds held in the GAC 50 PAF are plan assets and not included within the guaranteed policy exception:

> If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

H.R.Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077 ("Conference Report").

When confronted with a situation similar to the one before us, the Seventh Circuit recognized that group annuity contracts such as GAC 50 can be analyzed in terms of their guaranteed and non-guaranteed elements. The Seventh Circuit held in *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320 (7th Cir.1983) that the contract in that case was not a guaranteed benefit policy in its variable accumulation phase because the amount of funds available to the pension plan was determined by the manner in which the insurer exercised its investment discretion:

> The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to [the insurance company] to manage with full investment discretion, subject only to a modest income guaranty. If the pension plan had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act, and that is essentially what the trustees did during the accumulation phase of the contract. . . .

Id. at 327.

Similarly, in the case before us the insurer has maintained funds that were not converted to fixed, guaranteed obligations but instead were subject to fluctuation based on the insurer's investment performance. But the statute defining "guaranteed benefit policy," as noted previously, refers only to that phase of the contract in which the insurer is obligated to guarantee fixed benefits to plan participants. To the extent that the insurer engages in the discretionary management of assets attributable to that phase of the contract which provides no guarantee of benefit payments or fixed rates of return, it seems to us that the insurer should be subject to fiduciary responsibility. *See* 29 U.S.C. § 1002(21)(A).

The district court of course disagreed with the reasoning of *Peoria Union*, holding that retirement plan assets such as GAC 50 do not include funds held in an insurer's general account. In support of its conclusion, the district court reasoned that the

> amount provided to the covered employees remains fixed even if the PAF falls below the minimum operting level and the contract reverts to a deferred annuity type.... [I]f Hancock's general account experiences negative investment results, it must still pay the covered employees the amounts to which they are entitled.... Hancock could request additional contributions from Harris Trust, but Harris Trust would be free to decline. GAC 50 would then revert to deferred annuity form, and Hancock would be obliged to provide annuities to all covered employees in consideration of the benefits guaranteed to those employees up to that time.

Harris I, 722 F.Supp. at 1016-17.

The flaw in this reasoning lies in the fact that at certain times, until there is a conversion to guaranteed benefits, Hancock is managing assets taken in under GAC 50 as to which there are no guarantees. The fact that all the assets of GAC 50 are held in Hancock's general account is not significant in view of

Hancock's discretionary authority over the non-guaranteed phase of the contract. In *Mack Boring and Parts v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir.1991), the Third Circuit adopted the district court's approach in a case involving a contract with attributes similar to those of GAC 50. The Third Circuit held that the contract was, in its entirety, a guaranteed benefit policy because it was a "general account insurance contract in which the issuing insurance company guarantees to the plan participants a fixed amount of benefits, payable at a clearly stated time." *Id.* at 277. It was sufficient for the *Mack Boring* court that the contract made provision for "guaranteed benefits to plan participants at some finite point in the future." *Id.* at 273. That court in effect extended the statutory exemption to the entirety of any contract under which any benefits are guaranteed, so that the exemption would apply regardless of the apportionment between the guaranteed component and the investment component of the contract.

Two Advisory Opinions issued by the Department of Labor lend support to the notion that the free funds in GAC 50 are plan assets as to which Hancock is an ERISA fiduciary. In the first, reference is made to

> a Congressional intent that when an insurance company provides investment advice which determines the rate of return to the plan and its participants, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary responsibility provisions of the Act.

DOL Advisory Opinion 78-8A (March 13, 1978). As to at least one component of GAC 50, Hancock's investment performance clearly does affect the amount of funds available to the plan and its participants.

According to the second DOL Advisory Opinion,

> a conventional separate account (which holds contributions received from a plan and provides for the

> crediting of income on such amounts based upon the investment experience of the separate account) would not be considered to be maintained in connection with a fixed contractual obligation of the insurance company merely because assets of the separate account are ultimately applied to provide fixed annuities to participants, and the assets of such a separate account would be considered to be plan assets.

DOL Advisory Opinion 83-51A (September 21, 1983). The Department of Labor in the second opinion thus appears to take the position that "plan assets" for the purpose of the fiduciary responsibility provisions of ERISA do not lose their status as such merely because the ultimate use of the account may be to provide fixed annuities, where the plan assets are affected by investment performance.

Both advisory opinions were preceded by a seemingly contradictory Department of Labor pronouncement, Interpretive Bulletin 75-2:

> If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

This Interpretive Bulletin was confirmed in a regulation adopted November 13, 1986. *See* 29 C.F.R. § 2509.75-2 entitled "Interpretive bulletin relating to prohibited transactions." Despite the confusion, it seems to us that the Interpretive Bulletin was designed to deal with prohibited transactions in regard to

conflict of interest situations. Indeed, the preamble to the regulation recites that IB 75-2 was issued

> with respect to whether a party in interest has engaged in a prohibited transaction with . . . a corporation or partnership . . . in which the plan has invested.

There is no inconsistency in considering certain assets to be plan assets for general fiduciary duty purposes but not for prohibited transaction purposes. *See Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 729 F.Supp. 1162, 1184-85 (N.D.Ill.1989), *aff'd*, 941 F.2d 561 (7th Cir. 1991), *cert. denied*, ____U.S.____, 112 S.Ct. 1182, 117 L.Ed.2d 426 (1992).

(b) *As to the GAC 50 Contract*

We agree with the district court that the contract itself, GAC 50, is not a plan asset as to which Hancock has a fiduciary responsibility. According to the statute, the assets of a plan to which an insurer issues a guaranteed benefit policy "shall be deemed to include such policy." 29 U.S.C. § 1101(b)(2). The policy itself, with its bundle of contractual rights and responsibilities, therefore is similar to any other financial instrument owned by an employee benefit plan. Hancock is not a fiduciary in regard to the policy here, however, because it does not "exercise[ ] any discretionary authority or discretionary control . . . respecting management or disposition of" the policy itself. 29 U.S.C. § 1002(21)(A). Only Harris Trust as contractholder has discretionary authority over the guaranteed benefit policy *qua* policy.

The view that the holder of the contract is the entity subject to fiduciary responsibility is supported by legislative history:

> A trust is not to be required in the case of plan assets which consist of insurance (including annuity) contracts or policies issued by an insurance company qualified to do business in a State (or the District of Columbia) . . . . Although these contracts need not be

> held in trust, nevertheless, the person who holds the contract is to be a fiduciary and is to act in accordance with the fiduciary rules . . . with respect to these contracts.

Conference Report, *supra*, at 5079.

Obviously, Hancock has no power unilaterally to alter or amend a contract to which it is a party. It can act only under the terms of the policy, and any change in the policy requires the consent of the contractholder. We here deal with the policy in its entirety, and any power that Hancock had was referable to the terms of that policy. While Hancock may act as a fiduciary in carrying out certain of its contractual duties under the policy as previously described, it has no fiduciary responsibility in regard to the undivided contract. Neither of the cases that Harris Trust relies upon to support the argument that Hancock will be held to fiduciary standards with respect to the contract itself is apposite. In both *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 737-38 (7th Cir.1986), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987), and *Chicago Bd. Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254 (7th Cir.1983), the insurer had and exercised a unilateral right to alter in its discretion a critical contract term, resulting in prejudice to the contractholder. Such was not the case here, where Hancock at all times exercised its express rights under the contract. Fiduciary duties were implicated only when Hancock became involved in the administration or management of plan assets not referable to guaranteed benefits. *See Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir.1985); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-60 (3d Cir.1990).

(c) *As Affected By Prior Litigation*

In *Jacobson v. John Hancock Mutual Life Ins. Co.*, 655 F.Supp. 1290, *withdrawn pursuant to settlement*, 662 F.Supp. 1103 (D.Conn.1987), the plaintiff pension plan trustees asserted that Hancock was a fiduciary with respect to a Retro-IPG contract, similar to GAC 50, and the funds held under the contract. The *Jacobson* court granted partial summary judgment, holding that funds received by Hancock, not converted to fixed guaranteed obligations but held subject to fluctuations based on investment performance, were "plan assets" for which the insurer was accountable as an ERISA fiduciary. Hancock thereafter settled with the trustees, and the opinion was withdrawn pursuant to the settlement. Harris Trust argues that Hancock is estopped from relitigating the issue of its status as an ERISA fiduciary by the vacated district court order.

The district court properly rejected the argument of Harris Trust that Hancock is collaterally estopped from relitigating its fiduciary status as to Retro-IPG contracts by virtue of the district court's decision in *Jacobson*. The order entered on the stipulation of the parties in that case included the following language:

> ORDERED, that the Order, together with the findings and conclusions embodied therein, is withdrawn, set aside and vacated, and shall be of no force or effect for use against defendant, its successors and assigns, by plaintiffs, by the Pension Fund or by third parties, for collateral estoppel or other preclusive purposes. . . .

Jacobson, 662 F.Supp. at 1113. It is well-settled in this circuit that a vacated order has no collateral estoppel effect. *See Corporation of Lloyd's v. Lloyd's U.S.*, 831 F.2d 33, 36 (2d Cir.1987); *Universal City Studios, Inc. v. Nintendo Co.*, 578 F.Supp. 911, 919-20 (S.D.N.Y.1983), *aff'd*, 746 F.2d 112 (2d Cir.1984). We have held that it is an abuse of discretion for a district court to refuse to enter a vacatur pursuant to a settlement providing that the vacated order would not have collateral estoppel effect in any subsequent action. *Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280, 282 (2d Cir. 1985). We recognized in *Nestle* "the importance of honoring settlements over the finality of trial court judgments." *Id.* at 283. The district court correctly refused to estop Hancock from litigating its fiduciary status on the basis of *Jacobson*.

II. *Contract Termination*

Harris Trust contends that Hancock breached GAC 50 by terminating non-guaranteed benefit payments. We reject that contention and agree with the district court that Hancock properly terminated these benefits on 31 days notice. Hancock properly relied upon the following contractual provision as conferring the right to terminate:

Section 9. Payment of Non-guaranteed Benefits.

> Non-guaranteed Benefit payments shall be payable to a payee, provided the Pension Administration Fund is sufficient for the purpose, upon written notice from the [employer] to the [insurer]. . . . Non-guaranteed Benefit payments shall continue until
>
> * * * * * *
>
> (c) the date as of which the [insurer], by written notice filed with the Retirement Committee at least thirty-one days prior thereto, declares its intention to cease such payments.

GAC 50, 1977 Amendment, Article 4, Section 9.

It is the position of Harris Trust that Hancock has the right to terminate non-guaranteed benefit payments only if the PAF is insufficient to allow for such payments. That position is predicated principally on two provisions in the contract:

> On and after the Benefit Commencement Date of an employee, the Non-guaranteed Benefit for such an employee or his designated survivor shall be payable hereunder in accordance with the Plan until the earliest of the date of his death, the date the Retirement Committee notifies the Company in accordance with Section 9 of Article IV that said Non-guaranteed Benefit payments are to be cancelled, suspended or adjusted, or the date the Pension Administration Fund is not sufficient to provide the Non-guaranteed Benefits for the payee.

GAC 50, 1977 Amendment, Article II, Section 3.

> On the Benefit Commencement Date cf an employee and on each date thereafter on which a Non-guaranteed Benefit is due with respect to an employee on or before the date of termination of the Fund, a Non-guaranteed Benefit shall be provided hereunder with respect to each employee entitled thereto. The Company shall be liable for any amount of Non-guaranteed Benefit expressed to be payable only to the extent to which the Fund is sufficient to provide such amount.

GAC 50, 1977 Amendment, Article III, Section 2(b).

Contrary to the reading of Harris Trust, the contract does not prohibit termination before the PAF becomes insufficient. The Article III provision is entitled "Contributions" and in the main deals with the methods of contributions to the plan. The quoted language makes the unexceptional statement that non-guaranteed benefits are available only to the extent permitted by the PAF. The Article II provision is entitled "Dates of Coverage and Plan of Benefits" and deals specifically with those matters covered by that title. To say as that provision does that non-guaranteed benefits shall be payable until the date of death, notification by the Retirement Committee or the date the PAF is insufficient is not to gainsay the later provision of Article IV for termination on the basis of another contingency, i.e., thirty-one days notice. It is significant that Article IV follows the provisions upon which Harris Trust relies and, as amended, is entitled "Provisions Pertaining to the Payment of Benefits." It also is significant that Section 9 of Article IV is entitled "Payment of Non-Guaranteed Benefits," repeats the grounds for termination previously recited and adds one besides — termination on

notice. Important, if not controlling for our purposes, is the fact that all the grounds for termination provided in Section 9 are accorded equal dignity by being listed separately.

Although the district court took some testimony pursuant to Fed.R.Civ.P. 43(e) to determine whether there was an issue of fact in connection with the motion for summary judgment, it ultimately determined that

> the alleged conflict in language between Article IV, Section 9, and Article II, Section 3, relied on by plaintiff is resolved by the underlying structure of the contract itself, as to which there is no genuine issue of material fact . . . . Accordingly, Hancock's termination of non-guaranteed benefits in 1982 did not constitute a breach of contract.

Harris II, 767 F.Supp. at 1278. We endorse the conclusion of the district court. Where the language of a contract is clear, summary judgment is appropriate, and the fact that one party may have a different interpretation of the language does not make it any less plain. *See Investors Ins. Co. v. Dorinco Reins. Co.*, 917 F.2d 100, 104 (2d Cir.1990). The proper interpretation of a contract is a question of law for the court. *See Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir.1989). Extrinsic evidence is unnecessary where it is determined that the contractual language is unambiguous. *See Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344, 346, 489 N.E.2d 231, 233 (1986). The district court properly limited itself to the unambiguous contractual language in resolving the issue of termination in this case.

CONCLUSION

The judgment of the district court is reversed to the extent that it determined that Hancock had no fiduciary duty with regard to the excess funds allocated to the payment of non-guaranteed benefits and affirmed in all other respects. The case is remanded for further proceedings consistent herewith.

Judgment of the Court of Appeals

Harris Trust & Sav. Bank v.
John Hancock Mut. Life Ins. Co.,
No. 91-7854 (2d Cir. July 30, 1992)

United States Court of Appeals
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of July, one thousand nine hundred and ninety-two.

Present: HON. WILFRED FEINBERG,
HON. WILLIAM H. TIMBERS,
HON. ROGER J. MINER,

Circuit Judges.

HARRIS TRUST AND SAVINGS BANK, as Trustee for the Sperry Master Retirement Trust #2,

Plaintiff-Appellant,

— against —

JOHN HANCOCK MUTUAL LIFE INSURANCE CO.,

Defendant-Appellee.

Docket No. 91-7854

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JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Third-Party Plaintiff,

— against —

CHASE MANHATTAN, N.A.,

Counterclaim-Defendant,

and

SPERRY CORPORATION and THE RETIREMENT COMMITTEE OF SPERRY CORPORATION,

Third-Party Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk
By:

/s/Edward J. Guardaro
Edward J. Guardaro,
Staff Attorney

Opinion and Order of the District Court September 26, 1989

Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 722 F. Supp. 998 (S.D.N.Y. 1989)

HARRIS TRUST & SAVINGS BANK, as Trustee of the Sperry Rand Master Retirement Trust No. 2 (and its successor, the Unisys Master Trust), Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., Defendant.

No. 83 Civ. 5401(RPP).

United States District Court, S.D. New York.

Sept. 26, 1989.

OPINION AND ORDER

ROBERT P. PATTERSON, Jr., District Judge.

Harris Trust and Savings Bank, trustee of the Sperry Rand Master Retirement Trust No. 2, has sued John Hancock Mutual Life Insurance Company, alleging breaches of contract, breaches of fiduciary duty, professional malpractice, unjust enrichment, and assorted violations of the Employee Retirement Income Security Act of 1974 ("ERISA"). In these cross motions for partial summary judgment, the parties ask this Court to decide whether or not John Hancock is a fiduciary with respect to the Sperry Trust within the meaning of ERISA, and subject, therefore, to the responsibilities that attend that status.

In deciding the limited question presented by the parties' motions here, this Court considers only the Group Annuity Contract No. 50, as amended, and facts to which the parties have stipulated. For the reasons following the Court concludes that there are no genuine issues of material fact; and the Court finds as a matter of law that John Hancock is not an ERISA fiduciary with respect to the Sperry Trust. Accordingly, the defendant's motion for partial summary judgment is granted and the plaintiff's motion is denied. Fed.R.Civ.P. 56.

BACKGROUND

The following is taken from the agreed statement of facts to which the parties have stipulated for the purposes of their motions.

As of March 1, 1941, the Sperry Corporation and the John Hancock Mutual Life Insurance Company entered into Group Annuity Contract No. 50 GAC ("GAC 50").[1] From its inception until December 31, 1967, GAC 50 was a deferred annuity contract, under which Sperry purchased deferred annuities from Hancock on an annual basis for each employee eligible under the terms of the Sperry Rand Master Retirement Trust No. 2 (the "plan" or the "Sperry Trust"), once that employee became entitled to benefits in accordance with the plan ("the covered employees").[2] Upon the purchase of any deferred annuity, Hancock guaranteed the payment of that annuity to the covered employee (and his or her beneficiaries) for life to the extent that the employee and beneficiaries would be entitled to such a payment. In other words, once a covered employee's benefits vested pursuant to the terms of the plan, Hancock would guarantee the covered employee's benefits.

By an amendment effective as of January 1, 1968, GAC 50 was converted to a direct-rated retrospective immediate participation guarantee ("retro-IPG") form of contract. Hancock IPG contracts are "participating" contracts, sharing in the aggregate of the contract's mortality, expense, and investment experience to the extent that that experience is more favorable than the experience assumed in the contract's purchase rates.[3] Net

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[1] On November 12, 1986, the Sperry Corporation and the Burroughs Corporation merged to form the Unisys Corporation. The Sperry Rand Master Retirement Trust No. 2 was then succeeded by the Unisys Master Trust.

[2] The deferred annuities were to be payable to the employees (or their beneficiaries) upon the employees' retirement.

[3] Since 1959, Hancock, with the approval of the New York State Insurance Department, has used the "investment generation" method for allocating

(Footnote continued)

investment income allocated to an IPG contract is directly credited on an annual basis to that contract's Pension Administration Fund ("PAF" or "IPG Fund"). The amount of the PAF depends in part on the investment performance of Hancock's general account and upon the allocation of that performance to GAC 50. Under the 1968 Amendment, Hancock guarantees that the PAF on any date will not be less than it otherwise would have been if the sum of the net interest earned and capital gains and losses apportioned to the PAF had always been zero from January 1, 1968.

Pursuant to the 1968 Amendment to GAC 50, annuities purchased for certain employees up to December 31, 1967 were "cancelled," but Hancock continued to guarantee benefits to those employees and their beneficiaries. The 1968 Amendment also established a method for the provision of additional benefits payable for the period after December 31, 1967. Under the amendment, upon an eligible employee's retirement Hancock would determine, pursuant to rate tables contained in GAC 50, the amount by which the Liabilities of the Fund ("LOF")[4] would increase if that portion of the employee's retirement benefit accruing in the period after January 1, 1968 were to be guaranteed

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investment income. The investment generation method tracks the net increase in the experience account of each contract for each year (the "cell") and credits each cell with the rate of return for general account assets acquired by Hancock in the original investment year, adjusted for "rollover," which includes the maturity, sale, call, and elimination through default of assets. Through its investment generation method, Hancock allocates income, capital gains or losses, expenses, and taxes to lines of business participating in the experience of Hancock's general account. The same method is used by Hancock for the purpose of allocations to IPG contracts.

[4] GAC 50's LOF as of January 1, 1968 was based upon rate tables, incorporated into and made a part of the contract, which contained two and a half percent and three percent interest rate assumptions and employed the 1937 Standard Annuity and 1951 Group Annuity Mortality Tables, with specified adjustments to reflect mortality improvement. Since as of 1968, Hancock has used and continues to use the interest rate assumptions incorporated in the 1968 Amendment's rate tables in its annual computation of the portion of GAC 50's LOF that pertains to the pre-1968 Annuities.

by Hancock.[5] If GAC 50's PAF balance exceeded the contract's Minimum Operating Level ("MOL") (equal to 105% of its LOF), based upon this increased LOF, Hancock would guarantee the payment of the additional benefits. If the amount of the PAF fell below the amount of the LOF (or if the amount of the PAF and its Supplemental Fund balances together fell below the amount of the MOL), Hancock could ask Sperry for a contribution.

The 1968 Amendment provided that if Sperry failed to maintain the PAF balance at least equal to the LOF (or to maintain GAC 50's PAF and Supplemental Fund balances at or above the MOL), the PAF could be "terminated." Upon termination of the PAF, the contract would cease to function as a retro-IPG contract, and would thereafter function as a deferred annuity contract. The termination of the PAF would also result in Hancock's "repurchase" of the pre-1968 Annuities and the purchase of annuities sufficient to provide the benefits guaranteed by Hancock in the period after January 1, 1968, at the rates set forth in the 1968 Amendment. As of January 1, 1968, GAC 50's PAF balance equalled its LOF. Since at least the early 1970s, GAC 50's PAF balance has exceeded the amount of its MOL (and thus its LOF). GAC 50 provides that if there is a balance in the PAF upon its termination, Hancock shall pay or apply that balance in a manner to be determined by mutual agreement between Hancock and the plan's trustee, Harris Trust.[6]

By an amendment effective as of August 1, 1977, GAC 50 was converted to a retrospective immediate participation

[5] Hancock is required under GAC 50 to determine the LOF annually. In determining the LOF for GAC 50 Hancock each year has utilized the LOF rates incorporated into and made a part of the contract by the 1968 Amendment. As of January 1, 1968, the rates for the calculation of the portion of the LOF for retirement benefits guaranteed after December 31, 1967, incorporated a five percent interest factor and the 1951 Group Annuity Mortality Table, with specified adjustments to reflect mortality improvement.

[6] Harris Trust succeeded the Chase Manhattan Bank as trustee of the plan as of October 1, 1987.

guarantee/prospective deferred liability form of contract. Under the 1977 Amendment, GAC 50's LOF would not be increased automatically upon the retirement of any employee and new retirement benefits would not be guaranteed automatically by Hancock. On any date after August 1, 1977, the Sperry Retirement Committee ("SRC") could request that Hancock establish guaranteed benefits in addition to the benefits already guaranteed. Since the effective date of the 1977 Amendment, the SRC has not requested that Hancock establish any new guaranteed benefits.[7]

In November, 1988 Hancock transferred to Harris Trust, as trustee of the assets of the Sperry Rand Master Retirement Trust No. 2, approximately $53 million from out of the PAF.

DISCUSSION

I

The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub.L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001 et seq.), is Congress's comprehensive and farreaching regulatory scheme to protect employee pensions. In Congress's own words, ERISA exists

> to protect ... the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

[7] The 1977 Amendment also provided for and permitted under certain circumstances the payment of "non-guaranteed benefits." The 1977 Amendment further provided that the monthly amount of non-guranteed benefits for eligible employees designated by the SRC, as well as any determination of eligibility for such benefits, would be determined solely by the SRC in accordance with the plan. Pursuant to the 1977 Amendment, Hancock paid non-guaranteed benefits on a monthly basis through June 1982.

Id. § 1001(b); *See Massachusetts v. Morash*, ___ U.S. ___, 109 S.Ct. 1668, 1671, 104 L.Ed.2d 98 (1989) (Congress passed ERISA "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee beneifts"); *see also* 29 U.S.C. § 1001a(c); *id.* § 1001b(c). ERISA's scope is broad; it applies, with certain exceptions not germane, to "any employee benefit plan if it is established or maintained" by employers engaged in interstate commerce. *Id.* § 1003(a). Congress's commerce clause power, of course, is virtually limitless, and its exercise of that power in enacting ERISA was manifestly proper. *See, e.g., Hewlett-Packard Co. v. Barnes*, 425 F.Supp. 1294, 1300-01 (N.D.Cal.1977), *aff'd* 571 F.2d 502 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). Neither Harris Trust nor John Hancock contends otherwise. Nor do the parties suggest that the Unisys Master Trust is anything but an "employee benefit plan," a term that ERISA explicitly defines. *See* 29 U.S.C. § 1002(3); *id.* § 1002(1); *id.* § 1002(2); *cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987).

John Hancock takes the position nonetheless that when it enacted ERISA Congress did not mean to "alter the way in which insurance companies invest and manage billions of dollars of assets and dislocate the . . . framework of state regulation that has historically governed the industry practices that are the subject of [Harris Trust's] claims." Memorandum of Defendant in Support of its Motion for Partial Summary Judgment at 4. ERISA's broad preemption clause directs that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The preemption clause is subject to the important qualification of the "saving clause," *id.* § 1144(b)(2)(A), which states that ERISA "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ." According to Hancock, the Supreme Court held in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985), that the saving clause incorporates the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., which leaves the regulation of the business of insurance

exclusively to the states. Hancock argues that with respect to GAC 50 it is engaged in the business of insurance; therefore, Hancock concludes, ERISA does not here apply. And Hancock does not shy away from the more general implication of its argument: that when an insurer is engaged in a particular practice that is part of the McCarran-Ferguson "business of insurance," the insurer is free of ERISA's strictures.

At first glance, Hancock's argument seems compelling. In interpreting ERISA's preemption clause, the Supreme Court has stressed that a state law "relate[s] to any benefit plan" "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983); *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1551-52, 95 L.Ed.2d 39 (1987) ("the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern' ") (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981)); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2388-40, 85 L.Ed.2d 728 (1985). The saving clause then qualifies ERISA's preemptive effect. Discussing the saving clause in *Metropolitan Life*, the Supreme Court wrote:

> That mandated-benefit laws fall within the terms of the definition of insurance in the McCarran-Ferguson Act is directly relevant in another sense as well. Congress' "primary concern" in enacting McCarran-Ferguson was to "ensure that the States would continue to have the ability to tax and regulate the business of insurance." That Act provides: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance," appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving

> clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States. Moreover, § 514(d) of ERISA, 29 U.S.C. § 1144(d), explicitly states in part: "Nothing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." Thus application of the McCarran-Ferguson Act lends further support to our ruling that Congress did not intend mandated-benefit laws to be preempted by ERISA.

Metropolitan Life, 471 U.S. at 744 n. 21, 105 S.Ct. at 2391 n. 21 (citations omitted).

Read alone, the *Metropolitan Life* footnote does support Hancock's argument. Yet alone is how the footnote *must* be read to support Hancock's argument, for no case decided before or since, by the Supreme Court or any lower federal or state court, has gone as far. The footnote's context shows why not.

To begin with, footnote 21 is dictum. A close reading of *Metropolitan Life* demonstrates that the Supreme Court merely borrowed its McCarran-Ferguson analysis from prior cases to illuminate the similar statutory words of ERISA's saving clause. In *Metropolitan Life* the Court took a "common-sense view of the matter" and found that a Massachusetts law governing the content of general health plans was clearly one "which regulates insurance" within the meaning of the saving clause. 471 U.S. at 740, 105 S.Ct. at 2389. The Court then buttressed its conclusion by noting that state laws regulating the content of insurance contracts "relate to the regulation" of the "business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(a), as well. *See* 471 U.S. at 742-44, 105 S.Ct. at 2390-92. In evaluating the McCarran-Ferguson "business of insurance," courts typically consider the factors delineated in *Union Life Insurance Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3008-09, 73 L.Ed.2d 647 (1982),[8] and the

[8] Those criteria are "*First*, whether the practice has the effect of transferring or spreading a policyholder's risk, *second*, whether the practice is an integral

(Footnote continued)

Massachusetts statute met all three of the *Pireno* criteria. In short, the "traditional understanding of insurance regulation," embodied in McCarran-Freguson and elucidated in *Pireno*, combined with the "plain language of thc [ERISA] saving clause [and] its relationship to the other ERISA pre-emption provisions," together spared the Massachusetts law. *See Metropolitan Life*, 471 U.S. at 742-44, 105 S.Ct. at 2391-91. The petitioners in *Metropolitan Life* did not argue that ERISA did not apply at all, and, notwithstanding its footnote, the Court did not so hold.

Hancock argues that the practices of which Harris Trust complains constitute the "business of insurance," traditionally overseen and regulated by state insurance departments, and that under *Metropolitan Life* ERISA does not therefore apply. Taken to its logical extreme, Hancock's argument means that if ERISA does not preempt a state statute, the state statute, in effect, preempts ERISA. Yet ERISA's saving clause does not itself include Hancock's additional words, and the legislative history of the clause, which is sparse, does not fill in Hancock's putative statutory gap. *See Metropolitan Life*, 471 U.S. at 745 & nn. 22 & 23, 105 S.Ct. at 2392, nn. 22 & 23. This Court does not read *Metropolitan Life* or ERISA in that manner. ERISA need in no way alter traditional preemption analysis.[9] A court should

part of the policy relationship between the insurer and the insured, and *third*, whether the practice is limited to entities within the insurance industry." *Metropolitan Life*, 471 U.S. at 743, 105 S.Ct. at 2391 (quoting *Pireno*, 458 U.S. at 129, 102 S.Ct. at 3009 (emphasis in original)).

[9] *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (citations omitted):

> [S]tate law can be pre-empted in either of two general ways. If Congress evinces an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

not look to insurance company business practices in inquiring into ERISA preemption but, as the Supreme Court did in *Metropolitan Life*, should instead look to state statutes and common law causes of action. This interpretation of the Supreme Court's approach in *Metropolitan Life* is confirmed by the Supreme Court's approach in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), a case that is *Metropolitan Life's* complement. In *Metropolitan Life* the Court held that the Massachusetts mandated-benefits law was saved from ERISA preemption because it regulated insurance. In *Pilot Life* the Court held that Mississippi's common law tort and contract actions for improper claims processing did *not* regulate insurance, and *were*, therefore, preempted. The Supreme Court in *Metropolitan Life* and *Pilot Life*, and lower courts in other cases construing the saving clause, have used the language and case law of the McCarran-Ferguson Act to decide whether state laws ostensibly preempted, are, or are not, preserved. *E.g., Northern Group Servs Co. v. Auto Owners Ins. Co.*, 833 F.2d 85, 89-90 (6th Cir.1987). If a state statute meets the *Metropolitan Life* test, and thus fits ERISA's saving clause, the state law applies to the plan at issue. But ERISA applies to the plan as well.

Metropolitan Life is itself illustrative: because the Massachusetts law survived preemption, the decision "result[ed] in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not." *Metropolitan Life*, 471 U.S. at 747, 105 S.Ct. at 2393. While an uninsured plan would be subject solely to ERISA, an insured plan would be covered by both ERISA *and* the state law. *See id.; id.* at 748 n. 25, 105 S.Ct. at 2393 n. 25. This system of dual regulation comports with the language of the preemption and saving clauses, 29 U.S.C. § 1144, which save certain state statutes from preemption, but which also assume that ERISA applies ab initio. As the Seventh Circuit has written (in a case that predates *Metropolitan Life*),

> [t]hat ERISA does not relieve insurance companies of the onus of state regulation does not mean that Congress intended ERISA not to apply to insurance

> companies. Had that been Congress'[s] intent ... ERISA would have directly stated that is was preempted by state insurance laws. *Congress clearly intended that insurance companies be subject to dual regulation.*

Chicago Bd. Options Exch., Inc. v. Connecticut Gen. Life Ins. Co., 713 F.2d 254, 260 (7th Cir.1983) (emphasis added). If the New York and Massachusetts state laws that govern Hancock's behavior relate to employee benefit plans and regulate the business of insurance, the laws would survive ERISA preemption.[10] The state statutes *and* ERISA would both apply to the insurer's activities.

This system of dual regulation thus harmonizes ERISA and McCarran-Ferguson, at least to the extent that state and federal law do not directly conflict.[11] In this case, the relevant state laws do not clash with any provisions of ERISA, with one seeming exception. Mass.Gen.L. ch. 175, § 66B permits an insurance company to invest its general account assets in home office properties. ERISA flatly prohibits that type of investment. *See* 29 U.S.C.

[10] Among the statutes that Hancock cites are: N.Y. Ins. Law § 4224(a)(1) (prohibiting "unfair discrimination between individuals of the same class ... in the amount of payment or the return of premiums or rates charged for policies ... or in the dividends or other benefits"); N.Y. Ins. Law § 4226(a) (prohibiting unfair trade practices); N.Y. Ins. Law § 3201(b)(1) (requiring superintendent's approval of policy); Mass. Gen.L. ch. 175. § 93E (requiring insurers to keep surplus as reserves for obligation); Mass. Gen.L. ch. 175. §§ 63, 66B (regulating types of investments permissible for general accounts). Harris Trust concedes that each of the laws relates to employee benefit plans and that most of them probably regulate the business of insurance. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment app. A at 1-11.

[11] At least one lower court has held that a state law is preempted notwithstanding its coverage by the saving clause, since Congress intended to make the subject of that law ERISA's exclusive concern. *Lee v. Prudential Ins. Co.*, 673 F.Supp. 998, 1000-02 (N.D.Cal.1987) (California statute providing private cause of action for unfair claims settlement practices meets McCarran Ferguson "business of insurance" test for ERISA saving clause purposes, but preempted nonetheless because Congress meant to make ERISA's civil enforcement provisions exclusive); *cf. Kanne v. Connecticut Gen. Life Ins. Co.*, 859 F.2d 96, 100 (9th Cir.1988).

§ 1106. Nonetheless, the ERISA prohibition applies only to fiduciaries. Given this Court's conclusion that Hancock is not a fiduciary with respect to the Sperry plan, Hancock may invest its general account assets without violating ERISA's fiduciary requirements. *Cf. e.g., Fitzsimmons v. Old Security Life Ins. Co.,* Fed.Sec.L.Rep. (CCH) ¶ 96,236, 1977 WL 1057 (N.D.Ill.1977).

In further support of its argument that it is governed by state law, and exempt from ERISA, Hancock then turns to another section of ERISA itself, which provides that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, or supersede any law of the United States ...." 29 U.S.C. § 1144(d), *quoted in Metropolitan Life,* 471 U.S. at 744 n. 21, 105 S.Ct. at 2391 n. 21. The McCarran-Ferguson Act, of course, is a law of the United States. Congress drafted McCarran-Ferguson "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429, 66 S.Ct. 1142, 1154-55, 90 L.Ed. 1342 (1946), *quoted in SEC v. National Sec., Inc.,* 393 U.S. 453, 458, 89 S.Ct. 564, 567-68, 21 L.Ed.2d 668 (1969); *see also State Bd. of Ins. v. Todd Shipyards Corp.,* 370 U.S. 451, 452, 82 S.Ct. 1380, 1381-82, 8 L.Ed.2d 620 (1962); *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 218 n. 18, 99 S.Ct. 1067, 1077 n. 18, 59 L.Ed.2d 261 (1979); to "turn back the clock" and reinvest states with the exclusive regulation of the business of insurance, *see, e.g., Idaho ex rel. Soward v. United States,* 858 F.2d 445, 449-50 (9th Cir.1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 2063, 104 L.Ed.2d 628 (1989). As Hancock shows, and as Harris Trust apparently concedes, the practices of which Harris Trust complains are clearly part of the "business of insurance" within the meaning *Pireno. See* Memorandum of Defendant in Support of its Motion for Partial Summary Judgment at 25-33. The Sperry Trust would therefore come under McCarran-Ferguson. The trust just as clearly relates to an employee benefit plan, however, and it clearly comes under ERISA's purview as well. If ERISA and McCarran-Ferguson were really mutually exclusive, as Hancock contends, the two statutes would collide head on.

By its own terms, however, McCarran-Ferguson gives way. 15 U.S.C. § 1012(b) provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance ...." ERISA fits the McCarran-Ferguson exception for laws that specifically relate to the business of insurance. *See Spirt v. Teachers Ins. & Annuity Ass'n,* 691 F.2d 1054, 1065 (2d Cir.1982) (ERISA is "a statute which clearly 'specifically relates to the business of insurance' "), *vacated on other grounds and remanded,* 463 U.S. 1223, 103 S.Ct. 3566, 77 L.Ed.2d 1406, (1983); *Hewlett-Packard Co. v. Barnes,* 571 F.2d 502, 505 (9th Cir.) (per curiam) (there are "ERISA sections that undeniably 'specifically relate' to the business of insurance.... If McCarran-Ferguson applies, therefore, ERISA falls within the clause excepting federal laws that 'specifically relate' to the business of insurance."), *cert. denied,* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). Indeed, the "deemer" clause, 29 U.S.C. § 1144(b)(2)(B), uses the McCarran-Ferguson Act's very term of art: it provides that no employee benefit plan "shall be deemed to be an insurance company ... or to be engaged in the business of insurance ... for the purposes of any law of any State purporting to regulate insurance companies." The "guaranteed benefit policy" exception provides:

> For purposes of this part:
>
> . . . . .
>
> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
>
> . . . . .
>
>> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer....

29 U.S.C. § 1101(b); *see also Spirt, supra*, 691 F.2d at 1065 ("Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as the 'business of insurance' "); *Women in City Gov't United, Inc. v. City of New York*, 515 F.Supp. 295, 302-06 (S.D.N.Y.1981) (Title VII, "incorporated by reference into ERISA," applies to insurers, for "Congress'[s] concern that discrimination in employee benefits be prohibited outweighed the interest it had in the insurance industry and in the preservation of state insurance regulation").

Hancock is subject to dual regulation here for a further reason. As the Second Circuit has explained,

> [t]he McCarran[-Ferguson] Act does not ... exempt the business of insurance from the coverage of all federal statutes which do not specifically state that their provisions are applicable to insurance.... "[T]he McCarran-Ferguson Act was not intended to preclude the application of these federal statutes *unless* they invalidate, impair or supersede applicable State legislation regulating the business of insurance."

Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co., 408 F.2d 606, 611 (2d Cir.1969) (quoting 291 F.Supp. 225, 230 (S.D.N.Y.1968)). As discussed above, ERISA does not necessarily "invalidate, impair, or supersede" any of the state laws to which Hancock is subject. *See Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 421 (4th Cir.1984) (Fair Housing Act would not adversely affect state laws regulating business of insurance); *Miller v. National Fidelity Life Ins. Co.*, 588 F.2d 185, 186-87 (5th Cir.1979) (same conclusion concerning Federal Arbitration Act); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir.1969) (same). Because there is no conflict between them here, McCarran-Ferguson permits ERISA and state regulation of insurance to co-apply.

On more than one occasion the Supreme Court has remarked that ERISA's preemption and saving clauses "perhaps are not a model of legislative drafting." *Pilot Life, supra*, 481 U.S. at 46, 107 S.Ct. at 1552 (quoting *Metropolitan Life*, 471 U.S. at 739, 105 S.Ct. at 2389). In arguing that ERISA does not apply in this case at all, Hancock would add its own gloss to ERISA's words. Without more substantial language from Congress, however, or further guidance from the Supreme Court, this Court will not read in what Congress has not written. Accordingly, this Court holds that it must construe ERISA in resolving this motion.

II

Having concluded that ERISA is applicable to this dispute, the Court must now consider whether to give collateral estoppel effect to a decision rendered in *Jacobson v. John Hancock Mutual Life Insurance Co.*, Civ. No. N-84-663 (PCD): Ruling on Motion for Summary Judgment, 655 F.Supp. 1290 (D.Conn.), *judgment withdrawn and vacated pursuant to settlement*, 662 F.Supp. 1103, 1112-13 (1987).

The plaintiffs in *Jacobson* were the trustees of a union pension fund who had entered into a contract called the Group Annuity Contract No. 738 ("GAC 738") with John Hancock, the *Jacobson* defendant. In its original incarnation GAC 738 was a deposit administration contract ("DAC").[12] On January 1, 1973, GAC 738 became an immediate participation guarantee contract. Judge Dorsey described the IPG contract as follows:

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[12] Under the DAC regime, payments to Hancock were held in an "unallocated fund during the active lives of the participants." Hancock "periodically credited [the account] with interest and additional dividends could be credited depending on the fruitfulness of [Hancock's] investment strategies." "When a plan beneficiary retired, died, or became disabled, the amount of the premiums required to ensure the participant the benefits to which he was entitled under the plan was withdrawn and used to purchase an annuity." 662 F.Supp. at 1104 (citations omitted).

"The IPG [was] the fund in which amounts [were] accumulated by [defendant] to be used for the payment of the benefits provided under [the] contract." Employers of plan beneficiaries paid to plaintiffs [certain] amounts.... Those funds were then paid by plaintiffs to defendant.... A separate reserve was established by defendant as part of the IPG (referred to as the Liability of the Fund ("LOF")), from which annuities were purchased to meet the pension entitlement of a participant. "The [LOF] on any date was the sum of the amounts required to enable [defendant] to fulfill its guarantees with respect to: (a) the benefits established under [the contract], and (b) any due and unpaid amounts chargeable to the [IPG]." The mathematical formula designed to make the LOF calculations were fixed in the contract. At no time could plaintiffs' contributions fall below the minimal amount necessary to operate the fund—equal to 110% of the LOF.

Defendant "assume[d] no liability as to the sufficiency of [IPG] to provide for the benefits under [the] contract other than those benefits for which amounts [were] included in the LOF." Defendant was liable, however, for the contributions made to and for pension benefits once a participant's entitlement was fixed.... When an entitlement was determined, defendant credited the LOF with an amount necessary to pay the benefit. Defendant then commenced periodic payments in accordance with the entitlement. Defendant guaranteed those payments. Plaintiffs were obligated to make additional contributions to cover any shortfall experienced by the LOF. In default of such contributions, defendant's obligation to pay benefits was reduced by a percentage determined by the LOF shortfall.

"Contributions payable [to IPG were] assigned to the General Investment Account ["GIA"]...." The contributions actually made [to the IPG] were pooled

by defendant with its other contractholders' funds and invested.... The IPG differed from the DAC in that the latter established a partially fixed investment return and set the operating expenses at a fixed rate. The return on the investment in the IPG, however, depended entirely on the investment performance of defendant's GIA. Also, under the IPG, plaintiffs were charged with defendant's actual costs. The IPG accounts were adjusted annually to reflect the net investment experience minus expenses and taxes....

662 F.Supp. at 1104-05 (citations omitted).

In their complaint the *Jacobson* plaintiffs alleged that Hancock had violated the fiduciary requirements set out in 29 U.S.C. §§ 1104(a)(1), 1106(a)(1)(D), and 1106(b)(1)–(2). They then moved for partial summary judgment on the issue of Hancock's status as a fiduciary. In *Jacobson v. John Hancock Mutual Life Insurance Co.*, 655 F.Supp. 1290, *judgment withdrawn and vacated pursuant to settlement*, 662 F.Supp. 1103, 1112-13 (D.Conn.1987)). Judge Dorsey granted the plaintiffs' motion.

Judge Dorsey first decided that although the guaranteed benefit policy exception, 29 U.S.C. § 1101(b)(2)(B), "does indeed provide a safe harbor to insurance companies that sell standard annuity contracts to cover the anticipated needs of the relevant pension plan," that section "cover[s] only that phase of a contract in which the obligation of the insurer to guarantee the benefits payable to plan participants is fixed," and is therefore unavailing when "the level of funds available to support benefits which may become due fluctuates with the investment return of the insurer." 662 F.Supp. at 1107-08.[13] Judge Dorsey reviewed

[13] Judge Dorsey reasoned that "unlike the guaranteed annuity contract, benefits of any or all participants are not guaranteed under GAC 738 so long as the fund contributions are subject to the investment results achieved by the insurer.

(Footnote continued)

the legislative history of the guaranteed benefit policy exception and found that it "reflect[ed] a congressional intent to cloak the managers of both [general accounts and separate accounts] with fiduciary status." *Id.* at 1109.[14] He then considered Department of Labor Interpretive Bulletin 75-2, 29 C.F.R. § 2509.75-2 (1985), which supported Hancock's position. Judge Dorsey suggested that it was "an aberration in what ha[d] otherwise been a consistent [Labor Department] policy," and consequently, paid it no deference. *See id.* at 1109-11. Finally, Judge Dorsey examined Hancock's responsibilities under GAC 738 and decided that it "exercised significant control over the management of the plan." *Id.* at 1112. "Accordingly," he concluded, "[Hancock] is held to the standards of a fiduciary." *Id.*

According to Harris Trust, "the full spectrum of judicial concerns and public interests embodied in preclusion doctrine" demand that Judge Dorsey's desision preclude John Hancock from relitigating the issue raised in this motion. In other words, Harris Trust avers, Hancock should not be allowed to take "the proverbial 'second bite at the apple.' " Plaintiff's Reply Memorandum in Support of its Motion for Partial Summary Judgment at 68, 75.

The doctrine of issue preclusion holds that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58

Poor investment results might reduce or even exhaust the funds below the level sufficient to pay benefits as they become fixed and payable. It is this contingency which § 1101(b)(2) addresses." 662 F.Supp. at 1108.

[14] "This distinction [between general and separate accounts] . . . is irrelevant in identifying plan assets for purposes of § 1101(b)(2), since that section only distinguishes between accounts which guarantee benefits or returns and accounts which do not make such guarantees. Thus, only accounts which guarantee fixed returns and fixed benefits are sheltered." 662 F.Supp. at 1109.

L.Ed.2d 552 (1979)). As the Supreme Court has written, "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* 440 U.S. at 153-54, 99 S.Ct. at 973-74; *see also Parklane Hosiery*, 439 U.S. at 326, 99 S.Ct. at 649 (issue preclusion, or "[c]ollateral estoppel, . . . has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation") (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971)); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4416 (1981) [hereinafter Wright & Miller].

Judge Dorsey's entry of summary judgment against John Hancock in *Jacobson*, 655 F.Supp. 1290, could therefore warrant a similar order here. Federal trial courts enjoy "broad discretion" to decide when to apply issue preclusion offensively[15] *Parklane Hosiery*, 439 U.S. at 331, 99 S.Ct. at 1444. Judge Dorsey's order meets all the criteria of *Parklane Hosiery*.[16]

[15] A case "involves offensive use of collateral estoppel" when, as here, "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously lost in an earlier action." *Parklane Hosiery*, 439 U.S. at 329, 99 S.Ct. at 1443.

[16] *Cf. GAF Corp. v. Eastman Kodak Co.*, 519 F.Supp. 1203, 1211 (S.D.N.Y. 1981) (Pierce, J.): "Briefly stated, the following are preconditions to the application of collateral estoppel: (1) the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the prior action; (2) there must have been a final determination of the merits of the issues sought to be collaterally estopped; (3) the issues sought to be precluded must have been necessary, material, and essential to the prior outcome; (4) the issues sought to be precluded must have been actually litigated in the prior action, with the party against whom the estoppel is asserted having had a full and fair opportunity to litigate the issues; and (5) the issues actually and necessarily decided in the prior litigation must be identical to the issues sought to be estopped."

Hancock was an actual party to *Jacobson*, and Judge Dorsey gave it an opportunity to present its case. *See Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). Judge Dorsey's ruling was "an adequate and firm determination of one issue in a given action [and Harris Trust] need not await the resolution of the remaining issues before obtaining preclusive effect in a subsequent action." *Morano v. Dillon*, 746 F.2d 942, 945 n. 4 (2d Cir.1984) (per curiam) (citing *Zdanok v. Glidden Co.*, 327 F.2d 944, 955 (2d Cir.) (Friendly, J.), *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964)); *see Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir.1961) (Friendly, J.) (" 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."), *cert. denied*, 368 U.S. 986, 82 S.Ct. 601, 7 L.Ed.2d 524 (1962); *United States ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262, 1265 (2d Cir.1975), *cert. denied*, 426 U.S. 950, 96 S.Ct. 3172, 49 L.Ed.2d 1187 (1976); *Kurlan v. Commissioner of Internal Revenue*, 343 F.2d 625, 628 n. 1 (2d Cir.1965); *cf.* Wright & Miller, *supra*, §§ 4432-4434; *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 66 (2d Cir.1986). In his opinion Judge Dorsey addressed the same issues raised by the motions here, and though the contract in *Jacobson* is not identical to the one in this action, the contractual features that differed in GAC 738 were probably "not of controlling significance." *Montana*, 440 U.S. at 160, 99 S.Ct. at 977.[17] Nor has Congress changed any "controlling legal principles"

[17] Both GAC 50 and GAC 738 were retrospective IPG contracts converted from other types of group annuity contracts, both provided for the cancellation of the annuities purchased prior to conversion and the placing of the monies in funds held in Hancock's general investment account; and both contemplated payments to fund beneficiaries directly from that fund. *See generally* Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment at 66-69. It is true that GAC 738 did not contain a provision capping the risk charges at one percent, a provision germane to Hancock's argument that GAC 50 is an insurance contract, not an investment contract; and that GAC 738 was originally a deposit administration contract, not a deferred annuity contract, which seems to be a guaranteed benefit policy. Given the decision in *Nestle*, however, it is unnecessary to decide whether these distinctions would be important enough to preclude the application of collateral estoppel.

since. *Id.* at 161. 99 S.Ct. at 977-78. Finally, "none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present," *Parklane Hosiery*, 439 U.S. at 331, 99 S.Ct. at 652, Harris Trust could not have joined in the *Jacobson* action; Hancock, well aware of the magnitude of the stakes in *Jacobson*, "had every incentive to litigate the . . . lawsuit fully and vigorously," 439 U.S. at 332, 99 S.Ct. at 652; and Judge Dorsey's decision did not conflict with any other court's approach to the same issue—since no other court had yet faced it. In sum, under ordinary circumstances claim preclusion here would not be "unfair," *id.* at 331, 99 S.Ct. at 651-52, and the "contemporary law of collateral estoppel [should] lead[] inescapably to the conclusion that [Hancock] is collaterally estopped from relitigating the question" of whether it is an ERISA fiduciary, *id.* at 333, 99 S.Ct. at 652-53.

Jacobson, however, was not an ordinary case. Shortly after Judge Dorsey decided, on a motion for reconsideration, to adhere to his ruling on the motion for partial summary judgment, Hancock and the union trustees settled their dispute. The parties expressly conditioned settlement on "the entry of a final judgment by the Court pursuant to which (a) the order is withdrawn, set aside and vacated, and made of no further force or effect for use against defendant, . . . by the Pension Fund, or by third parties, for collateral estoppel or other preclusive purposes," 662 F.Supp. at 1113, and Judge Dorsey, bound by the rule of *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir.1985), entered an order that embodied the parties' agreement. Harris Trust argues that Judge Dorsey's order, though withdrawn, should nonetheless preclude Hancock from relitigating what it has already lost. In support Harris Trust relies on *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1187-92 (5th Cir.1982), *vacated on other grounds and remanded*, 460 U.S. 1007, 103 S.Ct. 1245, 75 L.Ed.2d 476 (1983); *cf. Angstrohm Precision, Inc. v. Vishay Intertechnology, Inc.*, 567 F.Supp. 537, 540-41 (E.D.N.Y. 1982). One of the defendants in *Chemetron* had previously defended a securities fraud action arising out of the same stock manipulation scheme, and the trial judge in that prior action had filed a lengthy opinion detailing his findings of fact and awarding the plaintiff in the suit almost three quarters of a

million dollars. Before the court actually entered judgment, the parties agreed to settle on the condition that the judge set aside his findings of fact. Later, in *Chemetron* itself, the plaintiff, which had not been a party to the prior action, asked the court to preclude the defendant common to both suits from relitigating the issues of fact that the judge in the prior action had withdrawn. After considering the factors mentioned in *Parklane Hosiery*, the Fifth Circuit held that offensive, nonmutual preclusion was fully warranted—the settlement notwithstanding:

> Tactically [the defendant] chose to litigate fully, . . . risking an adverse decision. He lost on that risk, and only when he lost did he decide to settle, fearing offensive collateral estoppel. Yet now he seeks to avoid the consequences of that risk by elevating form over substance. He cannot have it both ways. The findings of fact against [the defendant] in [the prior action] are sufficiently final to permit their use in this case. On remand, [he] should be collaterally estopped from relitigating those facts.

682 F.2d at 1191-92.

As Harris Trust notes, *Chemetron's* result makes some sense here: Judge Dorsey has already considred the issues raised by these motions, and forcing this Court to reconsider his thorough opinion would waste judicial resources. *Cf. Montana v. United States*, 440 U.S. at 153-54, 99 S.Ct. at 973-74. Harris Trust contends that the precise issue decided in *Chemetron* remains unanswered in the Second Circuit. It urges this Court to adopt the Fifth Circuit's approach. *Nestle Co. v. Chester's Market, Inc.*, 756 F.2d 280 (2d Cir.1985), however, suggests that for this Court, at least, the holding in *Chemetron* is foreclosed.

Shortly after Judge Blumenfeld ruled in *Nestle* in the defendant's favor on a motion for partial summary judgment, the parties negotiated a settlement conditioned on the vacatur of the opinion and judgment. Judge Blumenfeld then refused the parties' joint motion to vacate. *Nestle*, 596 F.Supp. 1445 (D.Conn.1984). On appeal, the Second Circuit reversed. Judge Winter began his opinion by finding that the dispute was not

moot, and that vacatur was not required by the rule of *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41, 71 S.Ct. 104, 107, 95 L.Ed. 36 (1950). Because of the settlement, however, vacatur would moot the action. "[W]e are faced," he wrote, "with a settlement that will bring pending litigtion to an end. Because the policies favoring finality of judgments are intended to conserve judicial and private resources, the denial of the motion for vacatur is counter-productive because it will lead to more rather than less litigation." *Nestle*, 756 F.2d at 282. Judge Winter continued: "It is instructive to note that where the parties have not reached a settlement and where vacatur of a district court's judgment might deprive a party of protection it had fairly won, we have not directed vacatur." *Id.* at 283. In sum, in the Second Circuit, "the importance of honoring settlements" outweighs "the finality of final judgments." *Id.; see also Federal Data Corp. v. SMS Data Products Group*, 819 F.2d 277 (Fed.Cir.1987). *Contra Matter of Memorial Hospital of Iowa County*, 862 F.2d 1299 (7th Cir.1988); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir.1982), *criticized in Nestle*, 756 F.2d at 283 n. 4.

Harris Trust argues that Judge Winter did not address the question presented here, and it quotes a sentence in which he wrote, "We are . . . not faced with new litigation which seeks to avoid directly or indirectly an otherwise final judgment, such as . . . a claim that a judgment previously entered in litigation between the parties over the same subject matter is not preclusive." *Id.* at 282; *see also* Note, "Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments," 96 *Yale L.J.* 860, 862 (1986). Yet the sentence's context makes clear that Judge Winter was explaining why Judge Blumenfeld's denial of the motion to vacate would lead to more litigtion—an otherwise unnecessary appeal—, and that Judge Winter referred to the preclusive effect of a valid, *unvacated* prior judgment as an example of when a district court might legitimately consider finality more important than settlement. Indeed, virtually every other sentence in Judge Winter's opinion suggests that litigants prepared to settle may contract with impunity over the preclusive effects of their dispute. A district judge in the Second Circuit must follow that lead. Judge Winter's

views are well stated in a passage he quotes from a leading treatise:

> All of the policies that make voluntary settlement so important a means of concluding litigation apply. The appellee as well as the appellant may prefer settlement, and can bargain for whatever future protection it needs. *It cannot be argued that the possible nonmutual preclusion interests of nonparties justify either appellate decision against the wishes of the parties, or an insistence that as a price of settlement the appellant must permit the district court judgment to support nonmutual preclusion.* The parties should remain free to settle on terms that require vacation of the judgment, entry of a new consent judgment, or such other action as fits their needs.

Wright & Miller, *supra*, § 3533.10, at 432, *quoted at* 756 F.2d at 283 (emphasis added).[18]

In sum, the decision in *Jacobson v. John Hancock Mutual Life Insurance Co.*, 655 F.Supp. 1290 (D.Conn.), *judgment withdrawn*

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[18] Judge Easterbrook spoke for the opposite view in *Matter of Memorial Hospital of Iowa County*, 862 F.2d at 1300, 1302:

> We always deny these motions [to vacate judgments after settlement] to the extent they ask us annul the district court's acts, on the ground that an opinion is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure.... When a clash between genuine adversaries produces a precedent, ... the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property.... To the extent an opinion permits the invocation of *Parklane [Hosiery]*, it may have great value to strangers – a value that one may try to approximate in settlement, but which is not theirs to sell. If parties want to avoid stare decisis and preclusive effects, they need only settle before the district judge renders a decision, an outcome our approach today encourages.

and vacated pursuant to settlement, 662 F.Supp. 1103, 1112-13 (1987), does not preclude John Hancock from relitigating the issues presented before Judge Dorsey. This opinion will now continue to consider the merits of the motions raised here.

III

The final issue presented by these motions requires that this Court interpret the language of ERISA's fiduciary sections. Justice Marshall recently described the proper method of construing a statute:

> Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and, if the statutory language is unclear, to its legislative history. Where these barometers offer ambiguous guidance as to Congress' intent, we defer to the interpretation of the provision articulated by the agencies responsible for its enforcement, so long these agency interpretations are "based on a permissible construction of the statute."

Public Employees Retirement Sys. v. Betts, – U.S. –, 109 S.Ct. 2854, 2870, 106 L.Ed.2d 134 (1989) (Marshall, J., dissenting) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984)). Because the statutory provisions here have gone relatively unexamined, the more general words of Judge Learned Hand are particularly worthy of note:

> It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1554, 95 L.Ed.2d 39 (1987) ("in expounding a statute, we [are] not ... guided

by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"), *quoted in Massachusetts v. Morash*, — U.S. —, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989).

The purpose and object of ERISA are set out in Congress's "findings and declaration of policy." Congress enacted ERISA *"to protect ... the interests of participants in employee benefit plans and their beneficiaries."* 29 U.S.C. § 1001(b). ERISA's legislative history is replete with comments that confirm that Congress intended to protect individual employees. The House Committee on Education and Labor, for example, wrote that "the primary purpose of [ERISA] is the protection of individual pension rights...., to improve the equitable character and soundness of private pension plans." H.R.Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4639, 4655. As the House Ways and Means Committee explained,

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire. This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income. In broad outline, the objective is to increase the number of individuals participating in employer-financed plans; [and] to make sure to the greatest extent possible that those who do participate in such plans actually receive benefits....

H.R.Rep. No. 93-807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 4670, 4676.

In furtherance of these purposes, ERISA makes certain persons[19] fiduciaries with respect to an employee benefit plan,

[19] "The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

and then holds them to fiduciary obligations. ERISA's fiduciary section provides that:

> (1) ... [A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
>
> (D) in accordance with the documents and instruments governing the plan....

29 U.S.C. § 1104(a); *see Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162 (6th Cir.1988) (citing *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982)); *see also* Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Admin. News 5038, 5075-5106 [hereinafter *Conference Report*].

ERISA defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent ... he ... exercises any authority or control respecting management or disposition of its assets....

29 U.S.C. § 1002(21)(A)(i).[20] Whether Hancock is a fiduciary with respect to the Sperry Trust thus depends on the following questions: First, what are the "assets" of the plan? Second, to what extent does Hancock "exercise . . . authority or control respecting [their] management or disposition"?

ERISA's general definitional section does not include the phrase "plan assets." At the same time, however, the fiduciary section itself provides for certain exceptions from its coverage. The exception relevant here provides as follows:

> For purposes of this part:
>
> . . . . .
>
> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
>
> . . . . .
>
> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. . . .

29 U.S.C. § 1101(b)(2)(B).

Hancock argues that in GAC 50 the Sperry Trust has been issued a "guaranteed benefit policy," and that this asset of the plan is the contract embodying the policy, GAC 50, and the corpus of rights that the contract contains.[21] Harris Trust argues that GAC 50 is an investment contract, not an insurance contract; and that even if GAC 50 is an insurance contract, it does not "provide[ ] for benefits the amount of which is guaranteed." Therefore, Harris Trust concludes, GAC 50 is not a guaranteed benefit policy, and the plan's assets here must accordingly include the funds contained in the PAF.[22] For the following reasons, this Court agrees with Hancock that GAC 50 comes under the protection of the "guaranteed benefit policy" exception.

According to Harris Trust, GAC 50 is an investment contract, not an insurance contract. In support of its argument Harris Trust cites *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202, 87 S.Ct. 1557, 18 L.Ed.2d 673 (1967), and *SEC v. Variable*

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[20] In its entirety, the fiduciary definition provides:

> (A) Except as otherwise provided in subparagraph (B) [which deals with securities issued by companies registered under the Investment Company Act of 1940], a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). ERISA further requires that

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 U.S.C. § 1102(a)(1). The written instrument establishing the Sperry Trust names the Sperry Retirement Committee as fiduciary of the plan; the SRC's duties—management and administration of the trust—are now carried out by the Pension Investment Review Committee of Unisys Corporation. Harris Trust does not appear to argue that fiduciary status should attach to Hancock by virtue of any of the definitions set out in the first clause of subpart (i) or in subparts (ii) or (iii) of 29 U.S.C. § 1002(21)(A).

[21] Hancock's position is set out for the most part in Goldberg & Altman, "The Case for the Nonapplication of ERISA to Insurers' General Account Assets," 21 *Tort & Ins. L.J.* 475 (1986). (The authors are members of the Fiduciary Task Force of the American Council of Life Insurance.)

[22] Hancock argues that the funds associated with GAC 50 are not "assets" at all, but a "bookkeeping account." This distinction, which lacks support in precedent and which contradicts some of Hancock's own descriptions of the contract, may be more of metaphysical than of legal significance.

Annuity Life Insurance Co., 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) ("*Valic*"). Neither case supports such a conclusion.[23]

In *Valic*, the Supreme Court faced the question of whether a variable annuity was a "insurance contract" within the meaning of the McCarran-Ferguson Act and the federal securities acts. The Court decided that it was a "security." Justice Douglas first noted that "the meaning of 'insurance' or 'annuity' under these Federal Acts is a federal question," not a question of state law. 359 U.S. at 69, 79 S.Ct. at 620-21. He then explained how variable annuities differ from fixed ones.

> First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. . . . The holder of a variable annuity cannot look forward to fixed monthly or yearly amount in his advancing years. It may be greater or less, depending on the wisdom of the investment policy. . . .
>
> The difficulty is that, absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing. . . . [W]e conclude that the concept of "insurance" involves some investment risk-taking on the part of the company. . . . For in common understanding "insurance" involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts.

Id. at 69-71, 79 S.Ct. at 621-22 (footnotes and citations omitted).

[23] Actually, both *Valic* and *United Benefit* pre-dated ERISA, and both addressed the scope of the insurance exception to the federal securities laws, not the guaranteed benefit exception to ERISA. *Cf. United Benefit*, 387 U.S. at 212, 87 S.Ct. at 1562-63. Thus, neither case is directly on point.

The Court's analysis in *United Benefit* was similar. As Justice Harlan described the contract at issue, the purchaser of the annuity paid premiums into a separate account, and the insurance company invested the funds for the most part in common stocks. During the contract's "accumulation" phase, "[i]nstead of promising to the policyholder an accumulation to a fixed amount of savings at interest, the insurer promises to serve as an investment agency and allow the policyholder to share in its investment experience. The insurer is obligated to produce no more than the guaranteed minimum at maturity, and this amount is substantially less than that guaranteed by the same premiums in a conventional deferred annuity contract." 387 U.S. at 208, 87 S.Ct. at 1560. Before the contract's maturity, the purchaser was "entitled to his proportionate share of the total fund and may withdraw all or part of this interest . . . [and] is also entitled to an alternative cash value measured by a percentage of his net premiums which gradually increases. . . . At maturity, the purchaser may elect to receive the cash value of his policy, measured either by his interest in the fund or by the net premium guarantee, whichever is larger." *Id.* at 204, 87 S.Ct. at 1559. Like a variable annuity, therefore, the deferred, or optional, annuity in *United Benefit* "allow[ed] the purchaser to reap the benefits of a professional investment program." *Id.* at 204, 87 S.Ct. at 1558. The fund did not fall within the insurance exemption to the securities laws because it was "considered to appeal to the purchaser not on the usual insurance basis of stability and security but on the prospect of 'growth' through sound investment management." *Id.* at 211, 87 S.Ct. at 1562; *see also Peoria Union Stock Yards Co. Retirement Plan. v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 324-25, 326-27 (7th Cir. 1983); *Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1130-34 (7th Cir.1986); *cf. Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1064 (2d Cir.1982).

As the agreed statement of facts reveals, GAC 50 is a retrospective immediate participation guarantee contract. An IPG contract works as follows:

> [IPG] contracts are similar to deposit administration contracts in that the employer's contributions are

placed in an unallocated fund and the life insurance company guarantees that the annuities for retired employees will be paid in full. They differ from deposit administration contracts in the extent to which, and the time at which, the insurance company assumes mortality, investment, and expense risks with respect to retired lives. The IPG contract may be said to have two stages of existence. The first or active stage continues for as long as the employer makes contributions sufficient to keep the amount in the fund above the amount required to meet the life insurance company's price to provide guaranteed annuities for employees who have retired. The contract enters its second stage if the amount in the fund falls to the so-called critical level.

In the active stage, the contract fund is charged directly with the contract's share of the life insurance company's expense[s] and credited directly with its share of investment income (minus a small risk charge). The fund is also credited or charged directly with contract's share of the company's capital gains and losses and the investment and expense experience with respect to retired employees. If the employer allows the fund to fall to the critical level and the contract enters the second stage, the amount in the fund is used to establish fully guaranteed annuities, and the fund itself ceases to exist.

Under an IPG contract, as long as the employer's contributions are sufficient to maintain the contract in active status, the life insurance company is relieved of investment, mortality, and expense risks with respect to all employees, both active and retired. If and when the contract enters the second stage, all these risks will be assumed by the insurance company. *Of course, the company is under a substantial risk during the active status of the contract, since it has provided a guaranteed price structure that the employer can unilaterally decide to take advantage*

of at any time that it feels the probable future course of investment, mortality, and expense risks will be such that it will be to its advantage to shift the risk to the life insurance company.

K. Black & H. Skipper, *Life Insurance* 496-97 (11th ed.1987) (emphasis added).[24] A retrospective IPG contract differs from a newly issued IPG contract in that it assumes responsibility for the guarantees already existing under the previous contractual regime.

Thus, unlike the contracts that governed the plans at issue in *Valic* and *United Benefit*, GAC 50 places the insurance risks on the insurer, not on the plan's covered employees. Nor does GAC 50 have an "accumulation" phase in which the amount available to the *beneficiary*, as opposed to the contractholder, might fluctuate, as it did in *United Benefit*.[25] Whatever the investment

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[24] Professors Black and Skipper note further that "[r]ecently, some IPG contracts have been modified, eliminating the guaranteed annuity rates; rather, they provide a certificate stating that the nonguaranteed payments will be made until the fund is exhausted. Under this arrangement the employer is responsible for the adequacy of the funding, and employees have no assurance from the life insurance company that their benefit payments will continue until death." *Id.* at 497.

[25] In *Peoria*, the Seventh Circuit found that the deposit administration contract at issue was an insurance contract during its annuity phase, but an investment contract during its accumulation phase, even though, "unlike [in] *United Benefit*, the annuitant himself—the employee—does not bear, at least directly, the investment risk created by the contract. His benefits are fixed; that is the essence of a defined benefits plan." 698 F.2d at 325. This extension of *United Benefit* ignores the fact that Congress expressly enacted ERISA to protect *employees*, not employers. *See* 29 U.S.C. § 1001(b); *Massachusetts v. Morash*, ____ U.S. ____, 109 S.Ct. 1668, 1671, 104 L.Ed.2d 98 (1989). *Peoria's* holding as to the contract's exemption from the securities laws should not require the same result as to ERISA. If the *covered employee's* retirement benefits are determined by years of service and salary, etc., and are not subject to variation based on investment performance during the accumulation phase, the investment effects on the employer do not make the contract any less an insurance contract as to the covered employee within the meaning of the guaranteed benefit policy exception. *Cf.* 698 F.2d at 328 (noting that on application for rehearing, newly hired counsel for the appellee offered "a number of arguments and authorities that . . . original counsel had not drawn to the attention of the court, [and that] [i]n view of the fact that the panel decision merely reverses the dismissal of the complaint under Fed.R.Civ.P. 12 (b)(6), the case is at an early stage and the appellee will have ample opportunity to present its [new] arguments . . . consistently with the flexible contours of the doctrine of the law of the case").

experience of Hancock's general account, as credited to the PAF, the covered employees receive a fixed amount determinable by reference to the terms of the plan and not by investment performance. *See* A.S.F. ¶¶ 10, 32, 42; GAC 50 art. II, § 2(F); *id.* art. V, § 1. This amount provided to the covered employees remains fixed even if the PAF falls below the minimum operating level and the contract reverts to a deferred annuity type. In other words, if Hancock's general account experiences negative investment results, it must still pay the covered employees the amounts to which they are entitled.

Harris Trust argues that Hancock's "risk" is illusory, since the LOF purchase rates for the contract contain interest assumptions of two and half and three percent, which Harris Trust calls "outmoded," thus maintaining the PAF at a higher level than it would be if the interest rates were revalued. Furthermore, Harris Trust argues that the possibility of a reversion of the contract is remote. As Harris Trust reads *Valic* and *United Benefit*, the Supreme Court was concerned with the amount of risk that the insurer assumed; since, according to Harris Trust, Hancock bears little risk at all. GAC 50 cannot be a contract of insurance. That argument, however, misconstrues the two cases: they were concerned with the *transfer* of risk from insured to insurer, not simply the nature of the risk the insurer might bear. Harris Trust's argument also minimizes certain of the substantial risks that Hancock does bear, and ignores certain others.

Hancock bears risks under GAC 50 in the following ways, among others:

- It guarantees benefit payments to pre-1968 covered employees and their beneficiaries in fixed amounts, regardless of any increases in life expectancy tables and regardless of the investment experience of Hancock's general account and its corresponding credit to the PAF. A.S.F. ¶¶ 10, 32, 42; GAC 50 art. II, § 2(F); *id.* art. V, § 1.
- It guarantees that post-1968 eligible employees will receive fixed payments on retirement, so long as the PAF is at least equal to the LOF at the time they become vested. A.S.F. ¶ 39.

- It guarantees that on any date the PAF will not fall below the amount that it would have been if the sum of the net interest earned and capital gains and losses apportioned to it had always been zero from the date of its conversion in 1968. A.S.F. ¶ 27; *see* GAC 50 art. III, § 3.
- It guarantees that the "risk charges" applicable to GAC 50 are capped at one percent. A.S.F. ¶¶ 43, 114.

Each of those facts obliges Hancock to bear risks.[38] For example, if Hancock's general account suffered adverse investment results, the PAF would fall below the level of the LOF. Hancock could request additional contributions from Harris Trust, but Harris Trust would be free to decline. GAC 50 would then revert to deferred annuity form, and Hancock would be obliged to provide annuities to all covered employees in consideration of the benefits guaranteed to those employees up to that time. Hancock would lose a sum of money equal to the amount by which the annuity payments to covered employees exceeded the premiums it had received plus the investment gains attributed to those premiums. Furthermore, the covered employees and their beneficiaries might outlive their assumed life expectancies, and under its guarantee Hancock would have to pay benefits

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[38] *See generally* K. Black & H. Skipper, *supra*, at 494:

> Life insurance companies are in the business of accepting risks, so they are willing to underwrite several different risks associated with pension plans and to underwrite them to varying degrees, depending on the employer's wishes. Some of these are as follows:
>
> 1. More individuals may live to retire than the mortality tables used anticipated.
>
> 2. Those who retire may live longer than the mortality tables used anticipated.
>
> 3. The rate of interest earned on investments may fall below the anticipated level.
>
> 4. There may be defaults in the investment portfolio, or it may necessary to sell particular investments at a loss.
>
> 5. Expenses of handling the play may be higher than anticipated.

for longer than it had calculated. Neither scenario was manifestly implausible in 1968. Hancock also guarantees that the rate tables under the contract will be applicable to both newly eligible employees or additional groups of employees, should Harris Trust so desire. Although interest rates have increased since 1968, they have been known to revert to their previous levels or lower, and, in that event, Hancock would still be obliged to guarantee those additional benefits. Given the possibility of a stock market crash, moreover, Hancock's guarantee of the principal of the PAF also constitutes the assumption of risk. These risks are not illusory, and were not illusory in 1968, when GAC 50 was amended. Indeed, Hancock's transfer in November, 1988 of approximately $53 million from the PAF to Harris Trust reduced the PAF to a level at which the contract's reversion to deferred annuity form may be triggered more readily. In sum, Harris Trust seems to be arguing that in hindsight, it does not like the bargain that it once struck. That argument should not change the terms of its contract, provided the covered employees are not prejudiced.

As noted above, ERISA defines a "guaranteed benefit policy" as "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b). The above interpretation of the statutory provision's language is supported by its legislative history. The conference committee report explained:

> An insurance company also is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company. If the policy guarantees basic payments but other payments may vary with, *e.g.*, investment performance, then the variable part of the policy and the assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

Conference Report, *supra*, at 5077. This commentary (which is the sole passage in the legislative history that deals with the

guaranteed benefit policy exception) confirms that while Congress did intend ERISA's fiduciary sections to cover variable annuity contracts, Congress did not intend to hold an insurer to a fiduciary standard if the contract it issues provides for fixed payments to the plan beneficiary.

Harris Trust interprets the conference report differently. It argues that the guaranteed benefit policy exception does not cover policies in which payments to the *contractholder* might fluctuate, and that since the funds in the PAF cannot be divided into those that support payments that are guaranteed and others that not guaranteed, the entire PAF must not be covered by the exemption at all.[27] Yet Harris Trust's argument rests on a misinterpretation of the word "benefit" in the statute and of the word "payment" in the conference report. ERISA was enacted to protect the interests of pension plan participants, that is, of employees, and not the fiscal wellbeing of their employers.[28] Each time ERISA uses the word "benefit," it refers to the payments made to the employees themselves. *See, e.g.*, 29 U.S.C. § 1002(7) (" 'participant' means any employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan"); *id.* § 1002(8) (" 'beneficiary' means a person designated by a participant ... who is or may become entitled to a benefit"); *id.* §§ 1023(e), 1054, 1056, 1104(a)(1)(A)(i), 1108(c)(1). The word "benefit" in the guaranteed benefit policy exception, and the word "payment" in the conference report,

[27] As a fallback position, Harris Trust argues the opposite—that Hancock should be deemed a fiduciary with respect to the sum of money in the PAF that exceeds the sum of the MOL (an amount Harris Trust refers to as "free money"). As Hancock notes, however, Harris Trust does not explain how such a bifurcation might work in practice. More significantly, given the Court's holding that a plan's "assets" do not include those funds held in an insurer's general account, the difference between the PAF and MOL is of no legal bearing. *See also American Inst. of Architects Benefit Ins. Trust v. John Hancock Mut. Life Ins. Co.*, No. CV 86-08436 (C.D. Cal. Sept. 14, 1987), *aff'd mem.*, 857 F.2d 1477 (9th Cir.1988).

[28] This Court is aware of employers terminating plans that are overfunded to provide funds for leveraged buyout obligations or other corporate purposes. (In some such cases, employees' pension benefits may remain secure but their employment status is sometimes affected.)

are no different; they too refer to benefits and payments to covered employees. Because GAC 50 provides for fixed payments to covered employees, it is covered by the guaranteed benefit policy exception.

Pronouncements by the Department of Labor, the administrative agency charged with ERISA's enforcement, *see* 29 U.S.C. § 1135, support the same conclusion. ERISA Interpretive Bulletin 75-2 provides as follows:

> (b) *Contracts or policies of insurance.* If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

29 C.F.R. § 2509.75-2 (1988). In hearings before a subcommittee of the House of Representatives, Assistant Secretary of Labor for Labor Management Relations Paul J. Fasser explained:

> Let's take a large multiemployer plan, having several thousand contributing employers, the benefits of which are wholly insured but not fully guaranteed. The insurance company invests the premiums it receives from the plan along with premiums received from other policyholders, in a wide variety of ways: corporate and government bonds, real estate mortgages, other secured loans, and some equities, to mention a few. Section 401(b) [29 U.S.C. § 1101(b)] could be read to mean that the insurance company could not invest its premium receipts in bonds or equity securities issued by any of the employers contributing to the policyholder plan, [that] it could not allow any of these employers to lease space in a building on which it held a mortgage, and [that] it could not purchase goods, services, or facilities from any one of those employers.
>
> . . . We studied the law and the underlying rationale of the prohibited transactions provisions, we studied the legislative history, we conferred with our colleagues at the Internal Revenue Service, we applied our collective common sense, and we concluded that Congress did not intend this result. We recognized that the prohibited transactions restrictions are designed to avoid conflicts of interest situations, but we knew that where the premiums paid by a plan are placed in an insurance company's general asset account, along with the assets of many other plans, the risk of any one plan being able to influence the investment policy of the insurance company respecting the general asset account is extremely slight.
>
> So we exercised our authority to interpret the law and we published an interpretive bulletin . . . stating that the mere investment of plan assets by a plan in a corporate entity or partnership does not convert the assets of the corporation or partnership into plan assets and does not make the managers of the corporation or partnership fiduciaries to the plan. Those managers are thus not restricted from engaging in normal business transactions, including transactions with persons who happen to be parties in interest with respect to the policyholder plans.

Oversight on ERISA: Hearings on Public Law No. 93-406 Before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. 390-91 (1975), *quoted in Jacobson, supra,* 662 F.Supp. at 1109-10 (and *reprinted in* Goldberg & Altman, "The Case for the Nonapplication of ERISA to Insurers' General Account Assets," 21 *Tort & Ins. L.J.* 475, 485-86 (1986)). This logic applies with equal force to single employer plans.

Harris Trust argues that other, later Department of Labor commentary contradicts Interpretive Bulletin 75-2. Harris Trust relies on Department of Labor Advisory Opinion 83-51A (Sept. 21, 1983) and on Department of Labor Advisory Opinion 78-8A (Mar. 13, 1978). Advisory Opinion 83-51A does seem to support Harris Trust's position. It includes the following comment:

> In the Department's view, a separate account would not hold "plan assets" for the purposes of the fiduciary responsibility provisions of ERISA if it is maintained by an insurance company solely in connection with its fixed contractual obligations and if neither the amount payable (or credited to) the plan or to any participant or beneficiary of the plan (including an annuitant) is affected in any way by the investment performance of the separate account. Since it appears that the contracts described in your letter provide for fixed obligations of the insurance company and that the investment performance of the separate accounts do not, in any circumstances, affect the insurance company's obligations to either the plan to which the contract is issued or to its participants and beneficiaries, such separate accounts would therefore not be considered to hold "plan assets."

Advisory Opinion 83-51A, at 2. As advisory opinions, however, the letters "apply only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and their situation conforms to the situation described in the request for opinion." ERISA Procedure 76-1, § 10, 41 Fed.Reg. 36,281 (Aug. 27, 1976); *see* Advisory Opinion 83-51A, at 2 ("This letter constitutes an advisory opinion under ERISA Procedure 76-1.... Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions."). Furthermore, both opinion letters address a question relating to funds held in *separate*, not general, accounts. *See* Advisory Opinion 78-8A, at 2 ("Although CREF labels its account a 'general' account, it is the view of the Department of Labor ... that the assets in the account which support obligations under variable annuity contracts issued to pension plans are plan assets.... The annuity contracts issued by CREF provide for variable benefits; generally assets supporting obligations under these contracts are held in a separate account.").

The opinion letters are therefore of no precedential significance. Instead, the Department of Labor has later confirmed the interpretation it set out in Interpretive Bulletin 75-2. *See Proposed Final Regulation Relating to the Definition of Plan Assets*, 51 Fed.Reg. 41,262 (Nov. 13, 1986); 50 Fed.Reg. 961 (Jan. 8, 1985). Because the Department of Labor's interpretation of the guaranteed benefit policy exception is manifestly "permissible," this Court "may not substitute its own construction." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). Accordingly, this Court holds that the assets held in Hancock's general account are not "plan assets" within the meaning of ERISA's fiduciary sections.

As the guaranteed benefit policy exception itself provides, because GAC 50 is a guaranteed benefit policy, the assets of the plan "shall be deemed to include such policy" — that is, GAC 50 and the bundle of contractual rights that flow from it. With respect to the policy, only the contractholder, not the insurer, is to be held to fiduciary standards. This conclusion finds support in ERISA's legislative history. Referring to the insurance contract exception to the requirement that "all plan assets are to be held in trust," 29 U.S.C. § 1103(b)(1), the Committee on Conference stated:

> A trust is not to be required in the case of plan assets which consist of insurance (including annuity) contracts or policies issued by an insurance company qualified to do business in a State (or the District of Columbia).... Although these contracts need not be held in trust, nevertheless, the person who holds the contract is to be a fiduciary and is to act in accordance with the fiduciary rules ... with respect to these contracts. For example, this person is to prudently take and keep exclusive control of the contracts, and is to use prudent care and skill to preserve this property.

Conference Report, supra, at 5079. A contrary interpretation would lead to absurd results. As Harris Trust notes, for example,

GAC 50 gives Hancock the authority to "ascertain and apportion any divisible surplus accruing under contracts of this class," GAC 50 art. V, § 7; *see* A.S.F. ¶ 28. Yet Hancock sets dividend rates for *all* its participating group annuity contracts, pursuant to the requirements of state law. It would impossible for Hancock to comply with ERISA's requirement that it act "solely in the interest" of the participants and beneficiaries of the Sperry Trust without simultaneously breaching its duties to all its other customers. Congress could not have intended such an outcome.[29]

CONCLUSION

In conclusion, this Court holds that John Hancock is not a fiduciary with respect to the Sperry Rand Master Retirement Trust No. 2. Accordingly, the defendant's motion for partial summary judgment is granted, and the plaintiff's motion for partial summary judgment is denied. The first count of the plaintiff's amended complaint is hereby dismissed.

IT IS SO ORDERED.

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[29] Harris Trust argues that the asset of the plan is the policy itself, that Hancock "exercises authority or control respecting management or disposition" of the policy. 29 U.S.C. § 1002(21)(A)(i), and that with respect to the policy Hancock must therefore abide by the fiduciary requirements. Harris Trust bases its argument on two cases, *Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Co.*, 713 F.2d 254 (7th Cir.1983), and *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, 805 F.2d 732 (7th Cir.1986); *see also F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir.1987). As Hancock points out, however, both *Chicago Board* and *Ed Miniat* involved contracts that gave the insurer the unilateral right to amend terms to the detriment of the trustee. *See* Memorandum of Defendant in Opposition to Plaintiff's Motion for Partial Summary Judgment at 74-79. GAC 50 does not confer any similar discretion.

Opinion and Order of the
District Court
July 12, 1991,
as amended August 6, 1991

Harris Trust & Sav. Bank v.
John Hancock Mut. Life Ins. Co.,
767 F. Supp. 1269 (S.D.N.Y. 1991)

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement
Trust No. 2, Plaintiff,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Defendant.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Third-Party Plaintiff,

v.

CHASE MANHATTAN BANK, N.A.,
Counterclaim Defendant,

and

Sperry Corporation and the Retirement Committee of Sperry Corporation, Third-Party Defendants.

No. 83 Civ. 5401 (RPP).

United States District Court,
S.D. New York.

July 12, 1991.

As Amended Aug. 6, 1991.

OPINION AND ORDER

ROBERT P. PATTERSON, Jr., District Judge.

Defendant John Hancock Mutual Life Insurance Company ("Hancock") moves pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Agreed Statement of Facts stipulated by the parties on November 23, 1988 (hereinafter "A.S.F. ¶ ___")

to dismiss the remaining claims of plaintiff's amended complaint. By its opinion and order dated September 26, 1989, this Court dismissed plaintiff's claim asserted under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). This motion relates to plaintiff's contract and common law claims.

The claims in this action arise out of or relate to Group Annuity Contract No. 50 ("GAC 50"), which was first entered into in 1941 by the defendant and Sperry Corporation ("Sperry") and covered non-bargaining unit employees of Sperry Gyroscope, Sperry Division.[1] A.S.F. ¶ 5. Hirschberg Tr. 18. Pursuant to GAC 50's original terms, Sperry purchased on an annual installment payments basis deferred annuities from Hancock payable for life to Sperry employees or their beneficiaries to the extent that the employees and beneficiaries would be entitled to such a payment upon the employees' retirement, according to the terms of Sperry's retirement plan. A.S.F. ¶ 6. In other words, once a covered employee's benefits vested under the plan, Hancock would guarantee those benefits. *Id.* ¶ 10. By agreement between the parties, GAC 50 has undergone substantial changes since 1941. Most relevant to this motion are those that occurred in 1968 and 1977.[2]

Effective January 1, 1968 GAC 50 was converted by amendment from a deferred annuity form of participating contract under which Sperry purchased deferred annuities from Hancock on an annual basis for the non-bargaining unit of the Sperry Gyroscope Division to a Retrospective Immediate Participation Guarantee form ("Retro-IPG") under which it guaranteed benefits for each eligible employee under GAC 50 for that employee who was also eligible under the terms of the Sperry Rand Retirement Trust No. 2 (the "Plan" or the "Sperry Trust"). A.S.F. ¶ 23.

[1] The factual background of this litigation is contained in large part in this Court's opinion of September 26, 1989, 722 F.Supp. 998. GAC-1150 covered the bargaining unit employees of the Sperry Gyroscope, Sperry Division.

[2] In 1968 Sperry determined to modify its method of funding employee pensions so that future retirees would not be provided guaranteed pension benefits from an insurance company but would look to investments of the Sperry retirement account to pay pension benefits. (Hirschberg Tr. 16, 78, 94).

Hancock IPG contracts are participating contracts in that the purchaser shares in the aggregate of the contract's mortality, expense and investment experience to the extent that that experience is more favorable than the experience assumed in the contract's purchase rates. *Id.* ¶ 11. Net investment income from Hancock's General Account allocated to an IPG contract is directly credited on an annual basis to that contract's Pension Administration Fund ("PAF").[3] The amount of the PAF depends in part on the investment performance of Hancock's General Account and the allocation of that performance to the IPG.[4]

Pursuant to the 1968 amendment, annuities purchased for certain employees up to December 31, 1967 were "cancelled," but Hancock continued to guarantee benefits to those employees and their beneficiaries. A.S.F. ¶ 32. The 1968 amendment also established a method for the provision of additional guaranteed benefits to be payable for the period after December 31, 1967 as more fully described in this Court's earlier opinion. In essence, if GAC 50's PAF exceeded its Minimum Operating Level ("MOL"), which was equal to 105% of the Liabilities of the Fund ("LOF"), Hancock would guarantee the payment of the additional guaranteed retirement benefits to those employees.[5] *Id.* ¶ 39.

[3] The deferred annuity form of contract had ultimately distributed such net experience to the contract holder as dividends. A.S.F. ¶¶ 17, 19. For purposes of this opinion "PAF" shall also include the Contingency Account which was part of the General Account (GAC 50, Article I, Section 18) since the parties' arguments do not rely on any distinction of consequence between the Contingency Account and the PAF.

[4] Under the 1968 amendment, Hancock guarantees that the PAF on any date will not be less than it otherwise would have been if the sum of the net interest earned and capital gains and losses apportioned to the PAF had always been zero from January 1, 1968. A.S.F. ¶ 27.

[5] If GAC 50's PAF balance fell below the amount of the LOF (or the amount of the PAF and Sperry's supplemental fund balances together fell below the amount of the MOL), Hancock could ask Sperry for a contribution. If the PAF balance was not at least equal to the LOF or if the GAC 50's PAF and supplemental fund were not equal to the MOL, the PAF would terminate and the contract would function thereafter as a deferred annuity contract pursuant to which Hancock had to provide annuities for all guaranteed benefits. A.S.F. ¶¶ 36, 40, 42.

Effective August 1, 1977 GAC 50 was converted to a Retrospective Immediate Participation Guarantee/Prospective Deferred Liability form of contract ("Retro-IPG-PDL") under which the employees retiring thereafter received some benefits guaranteed by Hancock and relied on Plan assets for the remainder. Under the 1977 amendment GAC 50's LOF would not be increased automatically upon the subsequent retirement of any employee and new retirement benefits would not be guaranteed automatically by Hancock. A.S.F. ¶ 80. The Sperry Retirement Committee ("SRC") could request that Hancock establish guaranteed benefits in addition to the benefits already guaranteed, but it did not do so. *Id.* ¶ 81. The 1977 amendment also permitted Sperry to designate employees eligible for non-guaranteed benefits and provided for the payment of such benefits by Hancock from the PAF or its Contingency Account within Hancock's General Account. Although the Sperry Retirement Committee did not request Hancock to pay any new guaranteed benefits subsequent to the effective date of the 1977 amendments, the Committee did designate that monthly payments of non-guaranteed benefits be paid to certain employees in 1977 and Hancock paid such non-guaranteed benefits through June 1982, when it gave Sperry 31 days notice in writing that it would no longer pay non-guaranteed benefits.

Hancock contends that it at all times fully performed its obligations under GAC 50 and its amendments and is entitled to summary judgment dismissing plaintiff's breach of contract claims. It further claims that plaintiff's claims for breach of fiduciary duty and for breach of an implied covenant of good faith and fair dealing must also be dismissed since all obligations of Hancock to the plaintiff arise solely from and are defined by the provisions of GAC 50.*

* On July 29, 1988, the parties submitted a proposed joint pretrial order to Judge Cedarbaum in which plaintiff's claims were identified as ERISA claims and common law claims. At a conference on September 16, 1988, Judge Cedarbaum authorized bifurcated motions for summary judgment along those lines. The ERISA motion has been decided. This motion is intended to dispose of the action.

I. *Contract Claims*

Where the language of a contract is unambiguous the question of interpretation is one of law to be answered by the court without reference to extrinsic evidence. *See Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985). If the language of a contract is otherwise plain, the parties cannot create a genuine issue of material fact simply by urging different interpretations. *See Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir.1989).

1. Did Hancock Improperly Retain Excess Funds Allocated to GAC 50?

In or about May 1982 Hancock denied a request from the Sperry Retirement Committee for a transfer of assets under what the parties had come to refer to as a "rollover procedure." Hearing Exh. 2.

It is necessary to refer to the history of GAC 50 to understand the reason for the dispute.

Prior to 1968, the Sperry Retirement Committee did not manage pension funds for its employees. At the time of the 1968 Amendment, the Committee took on a number of investment managers to manage various funds for the Plan to provide retirement benefits for its employees upon retirement. (Hirschberg Tr. 13-14) Starting in 1968, Hancock, in addition to providing guaranteed benefits under GAC 50 and similar annuity contracts, received responsibility from Sperry to manage for the Plan a smaller separate account, an equity investment account. (Hirschberg Tr. 14) Funds in the separate account, like the funds distributed to other investment managers retained by the Retirement Committee, did not provide guaranteed benefits and were assets of the Plan. (*Id.*) By 1977 it became evident to Hirschberg that the other fund managers were providing the Retirement Fund with a better rate of return than Hancock's General Account and he determined that the cost of the benefits guarantee provided by Hancock was excessive. Accordingly, Sperry's Retirement Committee desired to remove funds from Hancock's General Account and place them in other funds over which it could exercise more investment control. (Hirschberg Tr. 11, 15)

By the 1977 amendment, an employee who retired after 1977 had those benefits which had accrued prior to 1968 guaranteed by Hancock and those non-guaranteed benefits which accrued thereafter were funded only by the Plan's assets.[7] The Committee wanted to move so-called "excess funds" out of Hancock's General Account. It was in this context that Hirschberg explored ways with Hancock as to how a removal of excess funds might be achieved without incurring the contract's Asset Liquidation Adjustment ("ALA"). As an example, in 1977 the GAC 50 had an excess of funds in the General Account, whereas the GAC-1150, another Sperry guaranteed benefit contract, required a transfer of funds into its pension administration fund in the General Account to satisfy its annuity funding requirements. The Committee did not want to liquidate its equity portfolios in the separate accounts at Hancock to meet GAC-1150's shortfall. (*Id.* at 19) To meet this problem, so-called "excess funds" in GAC 50 were transferred by agreement of the parties to the separate accounts and then to GAC-1150 for its pension administration fund in the General Account. Hearing Exhs. L, T.[8] The net effect was to leave the balance of the General Account unchanged and no asset liquidation charge was imposed.

Hirschberg continued at meetings between representatives of both companies to press for the reduction of funds in GAC 50's General Account. Thereafter in 1979 and 1981 Hancock permitted the Committee pursuant to so-called "rollover arrangements" to withdraw certain amounts of "excess" funds from the PAF without the ALA required under GAC 50. Hearing

[7] An employee covered by GAC-50 who retired prior to 1977 had all his or her benefits guaranteed by Hancock. One of the Committee's purposes in effecting the change was to stop the growth of guaranteed benefits (Hirschberg Tr. 17) and increase the funds under the investment control of the Committee.

The 1977 amendment required Hancock to issue newly-worded certificates to retiring employees. Jefferson Tr. at 22.

[8] The excess funds were evidently transferred by Hancock's waiver of one of the requirements of the rollover transfer for direct-rated participating IPG contracts. Exh. 10, Pl.Exh. Binder.

Exhs. 4, 5, 11; Jefferson Tr. 46; Hirschberg Tr. 50. Hancock acknowledges it had a "rollover" policy which it offered to General Account customers whose balance of funds in that account exceeded liabilities by 20 percent and some other criteria, whereby the excess of cash inflow over cash outflow, plus 4% of the beginning fund balance of a PAF, could be transferred out of the General Account.[9] A.S.F. ¶ 77. In 1979 a rollover was offered to Hirschberg and accepted. In 1980 Hancock altered its policy and eliminated rollovers, except for "grandfathered" customers. (Penney Tr. 137) In 1981 Sperry asked for a rollover for 1980 and received it. Subsequently in 1981 Hancock eliminated rollovers for all customers. (*Id.* at 139)

Plaintiff maintains that these rollover withdrawals were by contract amendment pursuant to oral agreement of the parties and that it had a contractual right to such rollovers for every subsequent year. As evidence of that agreement plaintiff relies not on language of the contract or any formal written amendment thereto but on oral understandings which all witnesses for the defendant deny. To support its claim, plaintiff relies on two Hancock internal memoranda, Exhibits 10 and 12, a memorandum dated March 28, 1977 and a memorandum dated December 31, 1981, respectively. Exhs. 10 & 12, Plaintiff's Exhibit Binder Submitted in Opposition to Defendant's Motion to Dismiss filed Mar. 23, 1990 (hereinafter "Pl.Exh. Binder").

Although both these memoranda make reference to rollover arrangements and plaintiff's participation in them, they do not constitute amendments to the contract requiring a continuation of such rollovers.

In the first place, it is highly unlikely that any officer of either company expected a contract of this complexity and involving the

[9] Due to the guarantee provisions and state insurance laws or regulations, investments carried in the General Account were generally long-term investments, in very large part fixed income securities. After 1959 each year's investments were part of a "cell" carried at book value. A.S.F. ¶ 20. However, although the investments were long term, certain liquidations would occur during a year and those funds less offsets were utilized for rollovers.

amounts in question to be amended orally. Other amendments were made in writing. Furthermore, there are no references to amending the contract in either exhibit. Without such references and without an indication that Hancock was seeking to be bound contractually to permit future rollovers, the Statute of Frauds is not satisfied.

Neither exhibit contains expressly or by reasonable implication all the material terms of the agreement. Nor is there any indication of a continuing obligation with respect to "rollovers."[10] Under these circumstances the exhibits are insufficient proof of an agreement to be bound in futuro under the Statute of Frauds. *See Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 791 (2d Cir.1986); *Scheck v. Francis*, 26 N.Y.2d 466, 472, 260 N.E.2d 493, 311 N.Y.S.2d 841 (1970); *Morris Cohon & Co. v. Russell*, 23 N.Y.2d 569, 575, 245 N.E.2d 712, 297 N.Y.S.2d 947 (1969).

Plaintiff argues that partial performance removes the agreement from the Statute of Frauds. Plaintiff points to the 1979 and 1981 "rollovers" as evidence of partial performance of the continuing obligation to provide rollover as satisfaction of Hancock's Statute of Frauds defense. "The doctrine of part performance may be invoked only if plaintiff's actions can be characterized as 'unequivocally referable' to the agreement alleged." *Anostario v. Vicinanzo*, 59 N.Y.2d 662, 663, 450 N.E.2d 215, 463 N.Y.S.2d 409 (1983). *See Tribune Printing Co. v. 263 Ninth Ave. Realty, Inc.*, 88 A.D.2d 877, 878-79, 452 N.Y.S.2d 590 (App.Div. 1st Dep't), *aff'd*, 57 N.Y.2d 1038, 444 N.E.2d 35, 457 N.Y.S.2d 785 (1982). Here plaintiff's requests for withdrawals are explainable as a response to Hancock's alleged notification in August 1979 of the existence of the rollover as a generalized procedure. Pl.Mem. in Opp. at 35. They are not "unequivocally referable" to an amendment of the contract.

[10] It is true that Hancock's Philip Jefferson, in seeking approval by Hirschberg of a proposal to revalue the LOF, indicated that rollover would not be discontinued if the proposal were adopted (Exh. 12 at 3, Pl.Exh. Binder), but this implies that Hirschberg realized at the time there was no right to rollovers under the contract and the writing does not constitute a commitment to continuation of rollovers.

The Court also notes that New York Jurisprudence 2nd states that for the doctrine of partial performance to apply, "[t]he acts of part performance must have been done by the person insisting upon the contract." 61 N.Y.Jur.2d *Statute of Frauds* § 254 at 396 (1987). Here the claimed acts of part performance are by Hancock who disavows any such modification of the contract.

As for plaintiff's argument that promissory estoppel applies, that claim does not lie because plaintiff alleges no acts that were taken by it in reliance on the alleged oral promises of Hancock. *See Republic Nat'l Bank of New York v. Sabet*, 512 F.Supp. 416, 426 (S.D.N.Y.1980), *aff'd*, 681 F.2d 802 (2d Cir.1981), *cert. denied*, 456 U.S. 976, 102 S.Ct. 2241, 72 L.Ed.2d 850 (1982). Accordingly, the Court finds as a matter of law that the Statute of Frauds bars plaintiff's claim to a right to rollover for the years subsequent to 1980.

2. Termination of Non-Guaranteed Benefits

This dispute between the parties centers on the meaning of the 1968 and 1977 amendments and actions relating thereto. Plaintiff claims the failure of Hancock to continue to pay non-guaranteed benefits after June 1982 constitutes a breach of contract.[11]

[11] Because a "guaranteed benefit policy" is exempt from ERISA only "to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer," 29 U.S.C. § 1101(b)(2)(B), it could be argued that funds in GAC 50's PAF devoted to non-guaranteed benefits are subject to ERISA even though they are held in Hancock's General Account. Under 29 U.S.C. § 1101(b)(2)(B)

> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph
>
> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

(Footnote continued)

A significant event which preceded Hancock's alleged breach occurred in May 1982 when Hancock was notified by the Committee that the Committee had amended the Sperry Plan by expanding it to include retired employees of Sperry's Univac Division within the category of employees entitled to receive non-guaranteed benefits under GAC 50 and was requesting payment of non-guaranteed benefits to such employees.[11] A.S.F. ¶ 84. Hancock at first took the position that the Sperry Plan only contemplated payment of non-guaranteed benefits, such as cost-of-living adjustments, to employees already covered by the Plan (Hirschberg Tr. 41). When Sperry demurred, Hancock took the position that it was entitled to discontinue unilaterally payments of all non-guaranteed benefits under the terms of Article IV, Section 9, paragraph (c) of GAC 50 and gave the Committee 31 days notice in writing that it would terminate all such payments. Exh. 4, Pl.Exh. Binder.

Plaintiff maintains that Hancock was only entitled to give notice of termination of such payments if the amount of the Pension Administration Fund became insufficient to support the making of "Non-Guaranteed Benefit" payments.

The provision relied on by Hancock reads as follows:

Non-guaranteed benefits were paid not from segregated assets or a separate account but from surplus or so-called "excess funds" in GAC 50's PAF. Under the second sentence of subdivision (B), surplus held by an insurer in a separate account is not subject to ERISA because it falls within the "guaranteed benefit policy" exception. There is no reason to deny similar exemption to so-called "excess funds" under GAC 50 even though they are held in Hancock's General Account rather than in a separate account. "ERISA was designed to prevent a fiduciary 'from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.' " *Levy v. Lewis*, 635 F.2d 960, 968 (2d Cir.1980) (citation omitted). If Congress had intended ERISA's fiduciary requirements to apply to surplus held in an insurer's general account, it would have made its intention clear. *See Mack Boring & Parts v. Meeker Sharkey Moffitt*, 930 F.2d 267, 275 n. 17 (3d Cir.1991).

[11] The Univac Division manufactured Sperry's large computers and its employees had not been covered by GAC-50.

SECTION 9. Payment of Non-guaranteed Benefits

Non-guaranteed Benefit payments shall be payable to a payee, provided the Pension Administration Fund is sufficient for the purpose, upon written notice from the Sperry Rand Retirement Committee to the Company. Such notice shall specify the payee's Benefit Commencement Date and the amount, form and manner of such Non-guaranteed Benefit payments. Non-guaranteed Benefit payments shall continue until

(a) the date of death of the payee,

(b) the date as of which the Retirement Committee notifies the Company, in accordance with the next paragraph, that such Non-guaranteed Benefit payments are to be canceled, suspended, or adjusted,

(c) the date as of which the Company, by written notice filed with the Retirement Committee at least thirty-one days prior thereto, declares its intention to cease such payments,

(d) the date the Pension Administration Fund ceases to exist.

The Retirement Committee shall have the right to notify the Company that Non-guaranteed Benefits provided under this Contract shall be canceled, suspended or adjusted on and after the date specified by the Retirement Committee. Such notice must be in writing and be received by the Company at its Home Office prior to the date of cancellation, suspension or adjustment. On and after the date of cancellation or suspension specified in such notice, no further payments shall be made by the Company with respect to the Non-guaranteed Benefits provided for payees included in any cancellation notice or during the period of suspension for payees included in any suspension notice, and the Company shall have no responsibility with respect to any Non-guaranteed Benefits which may be canceled, or if Non-guaranteed Benefits are suspended, during the period of suspension. On and

> after the date of the adjustment specified in such notice, the liability of the Company with respect to the Non-guaranteed Benefits provided for payees included in such notice shall be equal only to the liability for the adjusted Non-guaranteed Benefits provided in such notice for such payees.

GAC 50, 1977 Amendment, Article IV, Section 9.

The Court's reading of the plain meaning of this Section is that, provided the PAF is sufficient for the purpose, Hancock shall initiate non-guaranteed payments to employees designated upon notice from the Committee and shall continue making such payments until (a), (b), (c) or (d) occurs.

Plaintiff argues that the PAF Fund was sufficient to make the payment of the non-guaranteed benefits to the Univac employees at the time of Hancock's termination and that until such date as the PAF was insufficient for that additional purpose, Hancock had an obligation to provide non-guaranteed benefits to the Univac employees. It bases its argument primarily on Article II, Section 3, which reads as follows:

> Section 3. Non-Guaranteed Benefits
>
> The Retirement Committee shall notify the Company in writing of the Benefit Commencement Date of an employee in advance of such date, and shall furnish such other information with respect to the employee or his designated survivor as is necessary to provide the Non-guaranteed Benefit.
>
> The monthly amount of Non-guaranteed Benefit to be provided hereunder for an employee shall be the amount to which he is entitled on such date in accordance with the Plan as determined by the Retirement Committee. The determination of eligibility for and the amount of such Non-guaranteed Benefit shall be made solely by the Retirement Committee and the Company shall have no responsibility for such determination.

> On and after the Benefit Commencement Date of an employee, the Non-guaranteed Benefit for such an employee or his designated survivor shall be payable hereunder in accordance with the Plan until the earliest of the date of his death, the date the Retirement Committee notifies the Company in accordance with Section 9 of Article IV that said Non-guaranteed Benefit payments are to be canceled, suspended or adjusted, or the date the Pension Administration Fund is not sufficient to provide the Non-guaranteed Benefits for the payee.

GAC 50, 1977 Amendment, Article II, Section 3.

Plaintiff also bases its argument on the following language added to Article III, Section 2, by the 1977 Amendment:

> Section 2. Pension Administration Fund
>
> a. The following heading is inserted immediately following the Section title: "A. Applicable to Guaranteed Benefits"
>
> b. The following paragraph and succeeding heading are added immediately following the second paragraph of this Section:
>
> "B. Applicable to Non-guaranteed Benefits
>
> On the Benefit Commencement Date of an employee and on each date thereafter on which a Non-guaranteed Benefit is due with respect to an employee on or before the date of termination of the Fund, a Non-guaranteed Benefit shall be provided hereunder with respect to each employee entitled thereto. The Company shall be liable for any amount of Non-guaranteed Benefit expressed to be payable only to the extent to which the Fund is sufficient to provide such amount.
>
> C. Applicable to Guaranteed and Non-guaranteed Benefits"

GAC 50, 1977 Amendment, Article III, Section 2(B).

Article III is entitled "Contributions" and relates to the method of computing how contributions from Sperry to the Plan were to be calculated. Accordingly, it does not appear to be relevant to Hancock's right to terminate non-guaranteed benefits.

Plaintiff argues that Article II, Section 3, Article III, Section 2, and Article IV, Section 9, can only be read in harmony if they are read as plaintiff suggests and that where two terms of a contract irreconcilably conflict, the first term, i.e., Article II, Section 3, governs. It has also asked the Court to look to extrinsic evidence in the form of an affidavit of its former Vice President, Thomas Hirschberg, who was ultimately responsible for managing the Plan, stating that he believed Hancock had no right to terminate such payments. Reference to such extrinsic evidence is unnecessary because the structure of the contract as testified to by witnesses for both parties makes the meaning of the contractual language clear.

At a hearing held on dates in December 1990 and January 1991 to determine whether there existed a genuine issue of fact on this issue and the rollover issue, it became evident that the history of the GAC 50 contract had a bearing on the constructions the parties were asking the Court to make. In the words of Kenneth Crafts, Sperry's retired employee, who had immediate responsibility for a lengthy period of time for the administration of GAC 50, Article II had originally actually been Sperry's group annuity plan for the covered employees and the retirement benefits to be available for these employees were designated thereunder. In this form, GAC 50 existed as the guaranteed benefit deferred annuity benefit plan for the employees until 1968. (Crafts Tr. 40-41)

Crafts stated that Article II was "the description of how benefits accrue for an employee." (*Id.* 41) Crafts stated Article IV, on the other hand, "defines how the benefits will be paid to the employee by Hancock, various forms of annuities, the date they start and the date they end, and the forms of annuity that he can have." (*Id.* 42) Hirschberg testified similarly that Article II "is restricted to the date of coverage and the definition of the retirement annuity," whereas Article IV covers "retirement annuity provisions, the mode of payment." (Hirschberg Tr. 30) This testimony was consistent with that of Judy Bennett, a former executive of Hancock, who drafted the 1977 amendment and made clear that Article IV, Section 9, paragraph (c) was drafted to protect Hancock. (Bennett Tr. 108, 125-26) The Court notes that by the 1977 Amendment the title of Article IV was changed to clarify its content to "Provisions Pertaining to the Payment of Benefits."

Since the alleged conflict in language between Article IV, Section 9, and Article II, Section 3, relied on by plaintiff is resolved by the underlying structure of the contract itself, as to which there is no genuine issue of material fact, plaintiff's position is rejected. Accordingly, Hancock's termination of non-guaranteed benefits in 1982 did not constitute a breach of contract.

3. Revaluation of the Rate Tables

The plaintiff next argues that Hancock breached GAC 50 by not revaluing GAC 50 rate tables (interest assumptions) with respect to pre-1968 annuities.

The provision of GAC 50 key to a determination of this issue is the second paragraph of Article III, Considerations, Section 2, Pension Administration Fund, whicn in pertinent part reads as follows:

> The Company shall re-determine on each Valuation Date on or before the date of termination of the Fund the Liabilities of the Fund, using on account of an employee, Contingent Annuitant and beneficiary to whom Retirement Annuity payments are then being made, the same rate basis and Table in Article VI as was applicable on the date an Annuity first became payable to the employee, Contingent Annuitant or beneficiary, whichever is applicable; provided, however, that with respect to any amount of annuity which was cancelled on January 1, 1968, in accordance with Section 1 of this Article, the rate basis and

> Tables in Article VI which were applicable on January 1, 1968 shall be used unless otherwise agreed upon between the Employer and the Company.

GAC 50, Article III, Section 2.

Plaintiff argues that the language shows the parties contemplated a revaluation of the rate and valuation tables and that Hancock had a duty to renegotiate in good faith the application of the rate valuation tables.

The language of Article III, Section 2, is that the rate basis and tables in Article IV applicable on January 1, 1968 "*shall* be used unless otherwise agreed upon."

Such language is at most an agreement to try to agree. As such, it is not enforceable. *See Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 417 N.E.2d 541, 436 N.Y.S.2d 247, 249 (1981). Accordingly, this claim of plaintiff is dismissed.

4. Assessment of Risk Charges

The plaintiff disputes Hancock's assessing a risk charge of 1% of the GAC 50 Pension Administration Fund's and the Contingency Account's share of net interest earned on Hancock's General Account. This claim rises and falls on the Court's determination of whether Hancock had an obligation to reduce excess funds by payment of non-guaranteed benefits and by permitting rollover. Since the Court has already determined Hancock's acts in connection with those two issues were permitted by the contract, this claim also fails. The 1% risk charge was permitted by the 1968 Amendment to Article III, Section 3.[13]

[13] Article III, Section 3, reads as follows:

> The Company shall add to the Fund, as of each December 31st subsequent to January 1, 1968, the Fund's share and the Contingency Account's share of the net interest earned and apportioned to the Group Annuity Branch of the Company for the calendar year ending on such December 31st, less 1% of such share.

5. The Asset Liquidation Adjustment

Next, the plaintiff argues that the defendant breached GAC 50 by misapplying and miscalculating the Asset Liquidation Adjustment ("ALA"). An ALA is applied when the contractholder requests a transfer or withdrawal from defendant's General Account. The ALA is applied to adjust the transferable balance (the excess of PAF over LOF) to reflect the current market value of the assets underlying Hancock's guarantee of benefits. Debits and credits to the PAF are charged or credited to that account in dollar amounts at book value. The underlying assets, those in Hancock's General Account, however, fluctuate in market value. As interest rates vary such fluctuations can be large since the investments are overwhelmingly long-term investments. In the event a contractholder requests a transfer of the Transferable Balance (the amount by which the PAF exceeds the LOF), a formula applicable to all contracts of the same class invested in the General Account is applied to determine the Transferable Balance in order to reflect the current market value of its share of the underlying assets. This adjustment is the ALA. GAC 50, Article III, Section 9. A market value adjustment may be positive or negative. If interest rates are higher at time of transfer than on purchase of the investments, the market value adjustment is negative. *See* D. McGill, Fundamentals of Private Pensions 535 (5th ed. 1984). The Court takes judicial notice of the high interest rates prevailing in the late 1970's and early 1980's over those in previous years.

Plaintiff claims Hancock breached GAC 50 by "arbitrarily and improperly imposing and calculating an assets liquidation adjustment." Pretrial Order, Plaintiff's Contentions of Law ¶ 23(e). Plaintiff acknowledges that no transfer under the contract was ever *formally* demanded and that no ALA was ever imposed. Instead it relies on the doctrine of anticipatory breach, citing estimates of ALAs provided by Hancock. Plaintiff claims these estimates would have been misapplied or miscalculated by defendant in the event transfer was ordered by plaintiff.[14]

[14] The ALA adjustment under Article III, Section 9, was only to be made in the event an actual transfer of assets occurred (the rationale for such

(Footnote continued)

Here the plaintiff relies on an analysis by Dr. Roger Ibbotson of the Yale University School of Management which takes issue with defendant's method of calculating the ALA. The Court finds it unnecessary to assess these conflicting methodologies because plaintiff's doctrine of anticipatory breach is flawed. Plaintiff continued to treat the contract as valid and subsisting after the estimates of ALA were made by Hancock. Where a party continues to treat a contract as valid and subsisting after the alleged repudiation, it may not rely on the anticipatory breach doctrine. *Strasbourger v. Leerburger*, 233 N.Y. 55, 59, 134 N.E. 834 (1922); *North Country Rocky Point, Inc. v. Lewyt-Patchogue Co.*, 60 A.D.2d 866, 401 N.Y.S.2d 258 (App.Div.), *appeal denied*, 44 N.Y.2d 643, 376 N.E.2d 936, 405 N.Y.S.2d 1027 (1978). *See Marvel Entertainment Group, Inc. v. ARP Films, Inc.*, 684 F.Supp. 818, 820-21 (S.D.N.Y.1988).

6. Failure to Pay Dividends

The plaintiff's claim that Hancock breached GAC 50 by failing to pay any dividends from 1971-1981 is based on Article V, Section 7, which reads as follows:

> This contract is a participating Contract. The Company shall annually ascertain and apportion any divisible surplus accruing under the contracts of this class.

The parties have stipulated that:

> Hancock's Board of Directors annually votes, in its "dividend vote," to apportion and pay or allow a distribution of surplus with respect to eligible group annuity contracts and votes therein to adopt formulas for determining the distribution of such surplus.

A.S.F. ¶ 16.

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adjustment being that a transfer of assets would require a liquidation of long-term investments in the General Account). This provision defines the method of calculation of an ALA, not when it may or may not be calculable. *Cf. Police Pension Comm'n v. John Hancock Mut. Life Ins. Co.*, No. 84-3815 (E.D.Pa. July 8, 1985); Kaye Dep. at 83-89; McCarthy Dep. at 35-36; Raskin Dep. at 384.

As required by state insurance law, Hancock, as a mutual life company, annually establishes dividend formulas and determines the amount of any dividend to be paid under its participating contracts and policies, including GAC 50. A.S.F. ¶ 28.

In general, courts give directors broad discretion as to the determination of dividends and relief will only be given in the event of willful neglect or bad faith. *See Rhine v. New York Life Ins. Co.*, 273 N.Y. 1, 6 N.E.2d 74 (1936); *Kern v. John Hancock Mut. Life Ins. Co.*, 8 A.D.2d 256, 186 N.Y.S.2d 992 (App.Div. 1st Dep't 1959), *aff'd*, 8 N.Y.2d 833, 168 N.E.2d 532, 203 N.Y.S.2d 92 (1960).

Exhibits 14-22 contained in Plaintiff's Exhibit Binder filed Mar. 23, 1990, the resolutions of the directors in the years in question, are evidence of no willful neglect. Defendant contends that its calculations came out against a dividend for the GAC 50 class of contractholders because the Contingency Account was not deemed to be large enough in relation to the risks under the liabilities of the contract. Winslow Aff. dated May 7, 1990 ¶¶ 2-5. Plaintiff's conclusory assertion that dividends should have been paid because the "surplus funds were wholly unnecessary for Hancock's security," Pl.Mem. of Law in Opp. at 55, is insufficient to raise a genuine issue of material fact. *See Delaware & Hudson Ry. Co. v. Consolidated Rail Corp*, 902 F.2d 174, 178 (2d Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 2041, 114 L.Ed.2d 125 (1991). Despite extended discovery there are no counter affidavits showing bad faith or neglect.

Under New York law "prima facie the apportionment of the divisible surplus by a mutual life insurance company must be deemed equitable," *Barnett v. Metropolitan Life Ins. Co.*, 258 A.D. 241, 245, 16 N.Y.S.2d 198, 202 (App.Div. 1st Dep't 1939), *aff'd*, 285 N.Y. 627, 33 N.E.2d 554 (1941), and plaintiff has a heavy burden to carry. *See Fidelity & Casualty Co. of New York v. Metropolitan Life Ins. Co.*, 42 Misc.2d 616, 248 N.Y.S.2d 559, 568 (N.Y.Sup.Ct.1963). Because the non-division of surplus affected all contracts of GAC 50's class and did not benefit Hancock (a mutual company); because the severe increase in interest

rates in the late 1970's would have meant a significant diminution in the market value of GAC 50 funds in the General Account carried at book value, of which the Court takes judicial notice, and because plaintiff offers no evidence of neglect or bad faith, plaintiff has failed to demonstrate that a genuine issue of material fact exists as to this claim. Accordingly, defendant's motion for summary judgment is granted.

II. *Common Law Claims*

1. Implied Covenant of Good Faith and Fair Dealing

Plaintiff argues that the totality of the circumstances surrounding Hancock's performance under GAC 50 demonstrates that Hancock has breached its covenant of good faith and fair dealing. Plaintiff's Mem. in Opp. at 57. Specifically, plaintiff objects to Hancock's termination of non-guaranteed benefits, failure to revalue rate tables for the pre-1968 annuities, refusal to permit rollover, assessment of risk charges, calculation of the ALA and failure to pay dividends, all of which relate to provisions of the GAC 50.

A covenant of good faith, however, cannot expand contract rights beyond the terms of the contract nor can a party violate that covenant when exercising its rights under the contract. *See VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F.Supp. 773, 777-78 (S.D.N.Y.1969). *See also Keene Corp. v. Bogan*, No. 88 Civ. 0217, slip op. at 14, 1990 WL 1864 (S.D.N.Y. Jan. 11, 1990) (WESTLAW, Allfeds database) (citing *VTR, Inc.*). Good faith or lack thereof is a matter for the Court to decide. *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 422 (8th Cir. 1986); Corbin on Contracts, § 654B at 924 (Supp.1989). The acts of defendant alleged by plaintiff since they are consonant with the contract's terms do not appear to amount to a breach of the implied duty of good faith. Plaintiff has not provided any facts showing defendant's acts were directed against plaintiff as opposed to acts carried out as ordinary corporate action.[15] Accordingly, summary judgment is granted on this issue.

[15] For over six years before the filing of this suit, Sperry received actual notice of the various components of the annual determinations made by Hancock *(Footnote continued)*

There remain other bad faith claims of plaintiff relating to company-wide practices of Hancock which must be considered: Hancock's investment of General Account funds in its home office building; Hancock's segmentation of assets in its General Account in 1982; and Hancock's policy of imputing bond and mortgage yields to newly-acquired common stock holdings in allocating income in the early 1970's.

Hancock's General Account into which Article I, Section 15 of GAC 50 required all Sperry's contributions be placed constituted the general corporate funds of Hancock. Absent some factual showing that a corporate investment decision regarding General Account funds was not made in a disinterested manner for the benefit of the company as a whole, which plaintiff's supporting papers do not make, plaintiff cannot challenge investments in corporate headquarters.[16] Accordingly, summary judgment is also granted on this issue.

As for segmentation, the parties have stipulated that in 1982 Hancock divided assets in its General Account into subaccounts, each having its own investment policy. A.S.F. ¶ 88. Thereafter, contracts in the subaccount including GAC 50 received investment income from assets in the so-called "Pension Participating Segment" but received no income from assets assigned to other lines of business such as guaranteed investment contracts in the "Pension Non-Participating Segment." Plaintiff claims that because in 1982 relatively more high-yield investments were assigned to the Pension Non-Participating Segment, GAC 50 was wrongfully deprived of investment income it would have received absent segmentation.

including the directors' failure to declare any dividends, A.S.F. ¶¶ 31, 34, 49-52, Plaintiff's Admissions ¶¶ 119, 124, 129. There is no evidence of any complaint by plaintiff to the annual determinations. Under these circumstances, the doctrine of laches bars any claims against Hancock on those grounds and indeed the six-year Statute of Limitations bars such claims. Sperry's argument that these annual determinations were of a summary nature is not an adequate excuse. If the determinations were summary, plaintiff could have asked for explanations.

[16] Massachusetts law permits an insurance company to invest its General Account assets in home office properties. Mass.Gen.L. ch. 175, § 66B (1987 & Supp.1991).

Finally, plaintiff objects to Hancock's policy from 1971-1977 of imputing to common stock investments made in a particular year the yields on Hancock's bond and mortgage investments made for that year in the first two years of the life of those common stock investments. A.S.F. ¶¶ 60, 63. This policy raised the "new money" rate for the General Account. *Id.* ¶ 61. Plaintiff claims that this policy penalized "old" contracts such as GAC 50 heavily weighted with older assets because the rate of return credited to these accounts was reduced in order to offset the additional investment income being imputed to the "new money" investments. McCarthy Aff. ¶ 9.

Relevant to both of these claims is the following stipulation by the parties:

> With respect to Hancock's General Account, Hancock has sole authority and discretion, in accordance with and as limited by applicable laws and regulations, to establish and execute investment policy and to allocate investment income, capital gains and losses and investment expenses to particular lines of business, classes of contracts and particular contracts.

A.S.F. ¶ 12. Plaintiff has not demonstrated any violation of this authority and discretion and thus has no grounds for objecting to Hancock's segmentation or imputation policies unless some applicable law or regulation was violated. Plaintiff argues that these policies resulted in GAC 50 being treated in a discriminatory fashion and thus violated New York Insurance Law § 4224(a)(1). Plaintiff's Mem. in Opp. at 65. That section provides:

> (a) No insurance company doing business in this state and no savings and insurance bank shall:
>
> (1) make or permit any unfair discrimination between *individuals of the same class* and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof;

N.Y. Ins. Law § 4224(a)(1) (McKinney 1985) (emphasis added). This section, like its counterpart pertaining to health insurance, § 4224(b), plainly applies to discrimination among individual insureds. *See, e.g., Health Ins. Ass'n of Am. v. Corcoran*, 154 A.D.2d 61, 551 N.Y.S.2d 615 (App.Div.) (challenging determination by State Superintendent of Insurance that use of HIV test results in screening applicants for health insurance violated § 4224), *aff'd*, 76 N.Y.2d 995, 565 N.E.2d 1264, 564 N.Y.S.2d 713 (1990); *Silver v. Equitable Life Assurance Soc'y*, 563 N.Y.S.2d 78 (App.Div.1990) (alleging that exclusionary rider discriminated against individual with congenital mental retardation). There is no allegation that Hancock unfairly discriminated among individual Sperry retirees and thus the segmentation and imputation policies were within Hancock's "sole discretion" by agreement of the parties.

2. Breach of Fiduciary Duty

Plaintiff asserts a claim for common law breach of fiduciary duty relating to Hancock's administration of GAC 50's General Account funds. Hancock argues that this claim is preempted by ERISA. ERISA's preemption provision, 29 U.S.C. § 1144, provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The Second Circuit has observed:

> [L]aws that have been ruled preempted are those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application — often traditional exercises of state power or regulatory authority — whose effect on ERISA plans is incidental.

See Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 146 (2d Cir.) (Connecticut escheat law not preempted), *cert. denied*, ___ U.S. ___, 110 S.Ct. 57, 107 L.Ed.2d 25 (1989). The Court ruled in its prior opinion that Hancock, as an insurer and issuer

of a "guaranteed benefit policy" based on its General Account assets did not have a fiduciary duty under ERISA with respect to assets held in its General Account for GAC 50 and dismissed plaintiff's ERISA claim. *See Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 722 F.Supp. 998 (S.D.N.Y.1989) (applying 29 U.S.C. § 1101(b)(2)(B)). Permitting plaintiff to assert a common law breach of fiduciary duty claim against Hancock in this context poses no danger of creating a "patchwork scheme of regulation," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11, 107 S.Ct. 2211, 2217, 96 L.Ed.2d 1 (1987), for employee benefit plans. *See Ventimiglia v. Gruntal & Co.*, No. 88 Civ. 1675, 1989 WL 251402 (S.D.N.Y. Nov. 1, 1989) (refusing to dismiss common law breach of fiduciary duty claim pleaded in the alternative to ERISA count but acknowledging that claim would fail if ERISA were later held to apply to the case). Such a claim is not preempted and may lie if there is evidence of a breach of fiduciary duty to the appropriate party.[17]

Plaintiff claims as a matter of case law that Hancock owed plaintiff a fiduciary duty, citing *Hartford Accident & Indem. Co. v. Michigan Mut. Ins. Co.*, 93 A.D.2d 337, 462 N.Y.S.2d 175 (App.Div. 1st Dep't 1983), *aff'd*, 61 N.Y.2d 569, 463 N.E.2d 608, 475 N.Y.S.2d 267 (1984). However, *Hartford Accident* refers to the fiduciary duty that exists "between an insurer and its assured." *Id.*, 462 N.Y.S.2d at 178. Because, as stipulated, what Hancock guaranteed was the payment of an annuity to covered employees for life (at least for any employees retiring prior to the 1977 amendment), it is clear that Sperry retirees are Hancock's only "assureds." A.S.F. ¶¶ 10, 32, 39, 80.[18] There is no

[17] Hancock would have fiduciary duties under ERISA with respect to funds not held in its General Account but held in its separate account which did not guarantee benefits but that claim is not made in this litigation.

[18] Article V, Section 1 of GAC 50 provides:

> The Company shall issue to the Retirement Committee, for delivery *to each employee covered hereunder*, an individual Certificate containing in substance a statement of the benefits to which the employee is entitled under this Contract and stating the name of the beneficiary to whom any death benefit shall be payable.

(emphasis added). These certificates are in the nature of guarantees.

showing that Hancock has violated a fiduciary duty to those employees or to any employees who retired thereafter insofar as those employees were guaranteed benefits. To the extent retirees under the Plan were required to look to the Plan assets and not to Hancock for payment of benefits, they were not Hancock's assureds. Plaintiff as trustee of the Sperry Plan is not an "assured" as to whom a common law fiduciary duty was owed by Hancock and there is no evidence showing the non-assured beneficiaries were damaged. Accordingly, this claim of plaintiff is dismissed.

3. Unjust Enrichment

Plaintiff also asserts a claim for unjust enrichment. Insofar as this claim is based on the failure to permit rollover and the assessment of risk charges on funds accumulated by reason of Hancock's termination of non-guaranteed benefits, refusal to permit rollover and its refusal to revalue rate tables for pre-1968 annuities, the claim is controlled by the express terms of the contract. Bargained-for benefits cannot be deemed to unjustly enrich a contracting party. *Cf. City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 48 (2d Cir.1988) (quasi-contractual relief unavailable where an express contract covers the subject matter). Accordingly, plaintiff's claim for unjust enrichment is denied and defendant's motion for summary judgment dismissing that claim is granted.

CONCLUSION

Defendant's motion for summary judgment dismissing plaintiff's contract and common law claims is granted. Plaintiff's complaint now having been dismissed in its entirety, Hancock's counterclaims and its third-party complaint are dismissed as moot. This case is hereby ordered closed.

IT IS SO ORDERED

Judgment of the District Court

Harris Trust & Sav. Bank v.
John Hancock Mut. Life Ins. Co.,
833 Civ. 5401 (RPP)
(S.D.N.Y. Aug. 16, 1991)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRIS TRUST & SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Plaintiff,

— against —

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Defendant.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Third-Party Plaintiff,

— against —

CHASE MANHATTAN BANK, N.A.,

Counterclaim Defendant,

— and —

SPERRY CORPORATION and THE RETIREMENT COMMITTEE OF SPERRY CORPORATION,

Third-Party Defendants.

83 *CIVIL* 5401 (RPP)

JUDGMENT

Defendant having moved pursuant to Rule 56, F.R.Civ.P., and the Agreed Statement of Facts stipulated by the parties on November 23, 1988 to dismiss the remaining claims of plaintiff's amended complaint, and the said motion having come before the Honorable ROBERT P. PATTERSON, U.S.D.J., and the Court thereafter on July 12, 1991, having handed down its opinion and order (#68325) and order amending opinion, dated August 8, 1991; granting defendant's motion for summary judgment dismissing plaintiff's contract and common law claims, and dismissing plaintiff's complaint in its entirety, and dismissing as moot Hancock's counterclaims and its third-party complaint, it is,

ORDERED, ADJUDGED AND DECREED: That defendant's motion for summary judgment dismissing plaintiff's contract and common law claims be and it is hereby granted, and it is further,

ORDERED, that plaintiff's complaint be and it is hereby dismissed in its entirety, and it is further,

ORDERED, that defendant's counterclaims and its third-party complaint be and they are hereby dismissed as moot.

DATED: NEW YORK, NEW YORK
August 16, 1991

/s/James M. Parkison
Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 8-16-91.

Denial by Court of Appeals of Petition for Rehearing and Suggestion for Rehearing *In Banc*

Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.,
No. 91-7854
(2d Cir. Sept. 23, 1992)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of September on thousand nine hundred and ninety-two.

HARRIS TRUST V. JOHN HANCOCK MUTUAL

DOCKET NUMBER: 91-7854

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee JOHN HANCOCK MUTUAL LIFE INSURANCE and a brief of the AMERICAN COUNCIL OF LIFE INSURANCE, amicus curiae, having been filed in support of appellee's petition for rehearing and suggestion for rehearing in banc,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk
/s/ by: Carolyn Clark Campbell
/s/ Chief Deputy Clerk

Statutes and Regulations Involved

15 U.S.C. § 1012,
29 U.S.C. § 1002(21)(A),
29 U.S.C. § 1101(b)(2),
29 U.S.C. § 1104(a)(1),
29 U.S.C. § 1144(a),
29 U.S.C. § 1144(b)(2)(A),
29 U.S.C. § 1144(d),
29 C.F.R. § 2509.75-2,
29 C.F.R. § 2510.3-101,
and
51 Fed. Reg. 41,262 (1986)

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1101. Coverage

* * *

(b) For purposes of this part:

* * *

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contact provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

* * *

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

* * *

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

29 C.F.R. § 2509.75-2. **Interpretive bulletin relating to prohibited transactions.**

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-2, with respect to whether a party in interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested.

On November 13, 1986 the Department published a final regulation dealing with the definition of "plan assets". See § 2510.3-101 of this title. Under that regulation, the assets of certain entities in which plans invest would include "plan assets" for purposes of the fiduciary responsibility provisions of the Act. Section 2510.3-101 applies only for purposes of identifying plan assets on or after the effective date of that section, however, and § 2510.3-101 does not apply to plan investments in certain entities that qualify for the transitional relief provided for in paragraph (k) of that section. The principles discussed in paragraph (a) of this Interpretive Bulletin continue to be applicable for purposes of identifying assets of a plan for periods prior to the effective date of § 2510.3-101 and for investments that are subject to the transitional rule in § 2510.3-101(k). Paragraphs (b) and (c) of this Interpretive Bulletin, however, relate to matters outside the scope of § 2510.3-101, and nothing in that section affects the continuing application of the principles discussed in those parts.

(a) *Principles applicable to plan investments to which § 2510.3-101 does not apply.* Generally, investment by a plan in securities (within the meaning of section 3(20) of the Employee Retirement Income Security Act of 1974) of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets" and thereby make a subsequent

transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.

For example, where a plan acquires a security of a corporation or a limited partnership interest in a partnership, a subsequent lease or sale of property between such corporation or partnership and a party in interest will not be a prohibited transaction solely by reason of the plan's investment in the corporation or partnership.

This general proposition, as applied to corporations and partnerships, is consistent with section 401(b)(1) of the Act, relating to plan investments in investment companies registered under the Investment Company Act of 1940. Under section 401(b)(1), an investment by a plan in securities of such an investment company may be made without causing, solely by reason of such investment, any of the assets of the investment company to be considered to be assets of the plan.

(b) *Contracts or policies of insurance.* If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

(c) *Applications of the fiduciary responsibility rules.* The preceding paragraphs do not mean that an investment of plan assets in a security of a corporation or partnership may not be a prohibited transaction. For example, section 406(a)(1)(D) prohibits the direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan and section 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan in his own interest or for his own account.

Thus, for example, if there is an arrangement under which a plan invests in, or retains its investment in, an investment company and as part of the arrangement it is expected that the investment company will purchase securities from a party in interest, such arrangement is a prohibited transaction.

Similarly, the purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.

Moreover, notwithstanding the foregoing, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

Similarly, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if such party in interest, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest may, with the aid of the plan but without the aid of any other persons, require the corporation or partnership to engage in such a transaction. However, the preceding sentence does not apply if the parties in interest engaging in the transaction, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest, may, by themselves, require the corporation or partnership to engage in the transaction.

Further, the Department of Labor emphasizes that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the

application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act.

[51 FR 41280, Nov. 13, 1986]

29 C.F.R. § 2510.3-101 Definition of "plan assets"—plan investments.

(a) *In general.* (1) This section describes what constitute assets of a plan with respect to a plan's investment in another entity for purposes of subtitle A, and parts 1 and 4 of subtitle B, of title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs (b) through (f) of this section define certain terms that are used in the application of the general rule. Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments. Paragraph (i) describes the assets that a plan acquires when it purchases certain guaranteed mortgage certificates. Paragraph (j) of this section contains examples illustrating the operation of this section. The effective date of this section is set forth in paragraph (k) of this section.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that —

(i) The entity is an operating company, or

(ii) Equity participation in the entity by benefit plan investors is not significant.

Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the investing plan.

(b) *Equity interests and publicly-offered securities.* (1) The term *equity interest* means any interest in an entity other than an instrument that is treated as indebtedness under applicable local law and which has no substantial equity features. A profits interest in a partnership, an undivided ownership interest in property and a beneficial interest in a trust are equity interests.

(2) A *publicly-offered security* is a security that is freely transferable, part of a class of securities that is widely held and either —

(i) Part of a class of securities registered under section 12(b) or 12(g) of the Securities Exchange Act of 1934, or

(ii) Sold to the plan as part of an offering of securities to the public pursuant to an effective registration statement under the Securities Act of 1933 and the class of securities of which such security is a part is registered under the Securities Exchange Act of 1934 within 120 days (or such later time as may be allowed by the Securities and Exchange Commission) after the end of the fiscal year of the issuer during which the offering of such securities to the public occurred.

(3) For purposes of paragraph (b)(2) of this section, a class of securities is "widely-held" only if it is a class of securities that is owned by 100 or more investors independent of the issuer and of one another. A class of securities will not fail to be widely-held solely because subsequent to the initial offering the number of independent investors falls below 100 as a result of events beyond the control of the issuer.

(4) For purposes of paragraph (b)(2) of this section, whether a security is "freely transferable" is a factual question to be determined on the basis of all relevant facts and circumstances. If a security is part of an offering in which the minimum investment is $10,000 or less, however, the following factors ordinarily will not, alone or in combination, affect a finding that such securities are freely transferable:

(i) Any requirement that not less than a minimum number of shares or units of such security be transferred or assigned by any investor, provided that such requirement does not prevent transfer of all of the then remaining shares or units held by an investor;

(ii) Any prohibition against transfer or assignment of such security or rights in respect thereof to an ineligible or unsuitable investor;

(iii) Any restriction on, or prohibition against, any transfer or assignment which would either result in a termination or reclassification of the entity for Federal or state tax purposes or which would violate any state or Federal statute, regulation, court order, judicial decree, or rule of law;

(iv) Any requirement that reasonable transfer or administrative fees be paid in connection with a transfer or assignment;

(v) Any requirement that advance notice of a transfer or assignment be given to the entity and any requirement regarding execution of documentation evidencing such transfer or assignment (including documentation setting forth representations from either or both of the transferor or transferee as to compliance with any restriction or requirement described in this paragraph (b)(4) of this section or requiring compliance with the entity's governing instruments);

(vi) Any restriction on substitution of an assignee as a limited partner of a partnership, including a general partner consent requirement, provided that the economic benefits of ownership

of the assignor may be transferred or assigned without regard to such restriction or consent (other than compliance with any other restriction described in this paragraph (b)(4)) of this section;

(vii) Any administrative procedure which establishes an effective date, or an event, such as the completion of the offering, prior to which a transfer or assignment will not be effective; and

(viii) Any limitation or restriction on transfer or assignment which is not created or imposed by the issuer or any person acting for or on behalf of such issuer.

(c) *Operating company.* (1) An "operating company" is an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is not described in the preceding sentence, but which is a "venture capital operating company" described in paragraph (d) or a "real estate operating company" described in paragraph (e).

* * *

(h) *Specific rules relating to plan investments.* Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

(i) A group trust which is exempt from taxation under section 501(a) of the Internal Revenue Code pursuant to the principles of Rev. Rul. 81-100, 1981-1 C.B. 326,

(ii) A common or collective trust fund of a bank,

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account.

(2) When a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for the purpose of offering or providing any benefit described in section 3(1) or section 3(2) of the Act to participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

(3) When a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. This paragraph (h)(3) does not apply, however, where all of the outstanding equity interests in an entity are qualifying employer securities described in section 407(d)(5) of the Act, owned by one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer, provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations (as determined under section 407(d)(7) of the Act) of which the issuer is a member.

(4) For purposes of paragraph (h)(3), a "related group" of employee benefit plans consists of every group of two or more employee benefit plans—

(i) Each of which receives 10 percent or more of its aggregate contributions from the same employer or from members of the same controlled group of corporations (as determined under section 1563(a) of the Internal Revenue Code, without regard to section 1563(a)(4) thereof); or

(ii) Each of which is either maintained by, or maintained pursuant to a collective bargaining agreement negotiated by, the same employee organization or affiliated employee organizations. For purposes of this paragraph, an "affiliate" of an employee organization means any person controlling, controlled by, or under common control with such organization, and includes any organization chartered by the same parent body, or governed by the same constitution and bylaws, or having the relation of parent and subordinate.

* * *

(k) *Effective date and transitional rules.* (1) In general, this section is effective for purposes of identifying the assets of a plan on or after March 13, 1987. Except as a defense, this section shall not apply to investments in an entity in existence on March 13, 1987, if no plan subject to title I of the Act or plan described in section 4975(e)(1) of the Code (other than a plan described in section 4975(g)(2) or (3)) acquires an interest in the entity from an issuer or underwriter at any time on or after March 13, 1987 except pursuant to a contract binding on the plan in effect on March 13, 1987 with an issuer or underwriter to acquire an interest in the entity.

(2) Notwithstanding paragraph (k)(1), this section shall not, except as a defense, apply to a real estate entity described in section 11018(a) of Pub. L. 99-272.

[51 FR 41280, Nov. 13, 1986, as amended at 51 FR 47226, Dec. 31, 1986]

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Parts 2509, 2510, and 2550

Final Regulation Relating to the Definition of Plan Assets

AGENCY: Department of Labor.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation that describes what constitute assets of a plan for purposes of certain provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act) and the related prohibited transaction provisions of the Internal Revenue Code (the Code). This document also contains a redesignation of the rule relating to guaranteed governmental mortgage pool certificates that was originally codified at 29 CFR 2550.401b-1. There has been considerable uncertainty regarding what constitute "plan assets" for purposes of ERISA, and the regulation will provide guidance to plan fiduciaries, participants and beneficiaries of plans and other affected parties.

* * *

Background

I. History of the Regulation

On January 8, 1985, the Department of Labor (the Department) published a notice in the **Federal Register** containing a proposed regulation that would characterize the assets of certain entities in which plans invest as including plan assets, with the result that the managers of those entities would be considered "fiduciaries" subject to the fiduciary responsibility provisions of ERISA.[1] The notice gave an opportunity for interested persons to comment on the proposal.

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[1] Proposed regulation 29 CFR 2510.3-101 (50 FR 961). That document also gave notice of withdrawal of a previously proposed regulation (45 FR 38084, June 6, 1980) and the withdrawal of most of the provisions of another previously proposed regulation (44 FR 50363, August 28, 1979) both of which dealt with the definition of plan assets. The Department also noted that the regulation, if adopted, would contain a revision and clarification of Interpretive Bulletin 75-2 (29 CFR 2509.75-2).

On February 15, 1985, the Department published a notice in the Federal Register containing an amendment modifying the effective date provision of the proposed regulation.[2]

A public hearing on the proposal was held in Washington, DC, on May 6, 7 and 8, 1985 at which time more than 45 commentators made oral presentations. At the conclusion of the hearing, the record in the proceeding was held open until June 30, 1985, in order to permit the filing of additional submissions.[3]

The Department has received more than 700 letters of comment regarding the proposal. The final regulation has been substantially revised in response to the comments received and the testimony at the public hearing.

The following discussion summarizes the proposed regulation and the major issues raised by the commentators and explains the Department's reasons for adopting the final regulation that is published with this notice.

II. Overview of the "Plan Assets" Issue

The proposed plan assets regulation described the circumstances under which the assets of an entity in which a plan invests will be considered to include "plan assets" so that the manager of the entity would be subject to the fiduciary responsibility rules of ERISA. Under ERISA, persons who exercise discretionary authority or control over the assets of a plan or who provide investment advice for a fee with respect to such assets are "fiduciaries" subject to the fiduciary responsibility provisions of the Act.[4] Thus, identifying a plan's assets is a critical step in identifying plan fiduciaries. Moreover, the fiduciary responsibility provisions of ERISA include prohibited transaction provisions which restrict the manner in which fiduciaries

[2] 50 FR 6362.

[3] Transcript of Hearing for May 8, 1985, at 110.

[4] See section 3(21) of ERISA.

may deal with the assets of a plan.[5] In general, a fiduciary may not use the assets of a plan to engage in transactions with "parties in interest" to the plan or plans for which he is acting.

In ERISA, the term "fiduciary" is defined broadly and in functional terms. Fiduciary status is determined with reference to a person's activities with respect to a plan; it does not depend upon any formal undertaking or agreement.[6] In the Department's view, there are many situations where a plan, although nominally investing its assets in a separate entity, is as a practical matter retaining the persons who manage the entity to provide investment management services for the plan. For example, some institutional managers – such as banks and insurance companies – have traditionally pooled the assets of several plans for purposes of collective investment, and plans typically participate in such a fund by acquiring investment units evidencing an interest in the fund. More recently, limited partnerships have been used as devices for the collective investment of plan assets.

Although ERISA does not explicitly define what constitute "plan assets", it does deal specifically with certain kinds of collective investment arrangements. Section 401(b)(1) of ERISA provides that, in the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of the plan will be deemed to include such security, but will not, solely by reason of the plan's acquisition of the security, be deemed to include any assets of the investment company.[7] Similarly, section 401(b)(2) of ERISA

[5] See section 406 of ERISA. The prohibited transaction provisions of ERISA are complemented by section 4975 of the Code which imposes an excise tax on disqualified persons who engage in prohibited transactions.

[6] See H.R. Rep. No. 1280, 93d Cong., 2d Sess., 323 (1974) (the Conference Report).

[7] The Conference Report indicates that this statutory exclusion was included in ERISA in view of the existence of regulation under the Investment Company Act and because interests in registered investment companies must be widely held. Conference Report at 296. Section 3(21)(B) of ERISA also indicates that neither a registered investment company, its investment adviser nor its principal underwriter is deemed to be a fiduciary by reason of a plan's investment in the investment company, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of such company, adviser or underwriter.

provides that when a plan acquires a "guaranteed benefit policy" from an insurance company, the assets of the plan include the policy, but do not include any of the underlying assets of the insurance company issuing the policy.

ERISA also includes provisions which indicate that the underlying assets of certain kinds of collective funds do include "plan assets."[8] Thus, the Act contains special reporting and disclosure provisions where some or all of the assets of a plan are held in an insurance company separate account or a bank common or collective trust fund.[9] In addition, the legislative history accompanying ERISA clearly indicates that the assets of such traditional investment funds should be considered "plan assets" subject to the fiduciary responsibility rules of the Act.[10]

In the Department's view, it would be unreasonable to suppose that Congress intended that the protections of the fiduciary responsibility provisions of the Act which are applicable where a plan directly retains a manager of its investments would not be applicable where the manager is retained indirectly through investment by the plan in a collective investment fund. It would also appear to be inconsistent with the broad functional definition of "fiduciary" in ERISA if persons who provide services that would cause them to be fiduciaries if the services were provided directly to plans are able to circumvent the fiduciary responsibility rules of the Act by the interposition of a separate legal entity between themselves and the plans (for example, by providing

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[8] In such case, a plan's assets would include its interest in the fund and an undivided interest in each of the underlying assets of the fund.

[9] Section 103(b)(3)(C) of the Act.

[10] "[I]nsurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts and the assets of these contracts are to be considered as plan assets. . ." Conference Report, at 296. "The conferees understand that it is common practice for banks, trust companies and insurance companies to maintain pooled investment funds for plans. . . . Banks, etc. that operate such pooled investment funds are, of course, plan fiduciaries." Conference Report, at 316.

services to a limited partnership in which plans invest). However, neither ERISA itself nor the legislative history of the Act provides a clear indication of the extent to which the fiduciary responsibility provisions of the Act are intended to apply when a plan invests in another entity which may be a vehicle for collective investment of plan funds. In developing a regulation to address this issue the Department has taken into account the public comments on the proposed regulation and the testimony at the public hearing, the express statutory provisions of ERISA, the relevant legislative history and the existing federal regulatory structure applicable to entities in which plans invest.

III. Description of the Proposed Regulation

In order to determine when an investment is an arrangement for the indirect provision of investment management services, the proposed regulation established a "look-through" rule pursuant to which a plan would, in cases where the rule applies, be considered to have acquired an interest in the underlying assets of an entity in which it invests so that the assets of the entity would include "plan assets." To define the scope of the look-through rule, the proposed regulation also established a series of exceptions to the rule. The proposed regulation reflected a general policy determination that the fiduciary responsibility provisions of the Act should apply to an entity in which a plan invests only if: (1) The plan's investment is such that it has an opportunity to participate in the earnings of the entity; (2) the entity itself is an investment fund; and (3) there is some indication that interests in the entity are offered especially to plans. Although, as discussed below, the Department has made several modifications to the regulation in response to the comments received, this general policy approach is reflected in the final regulation.

The first exclusion in the proposed regulation was for plan investments that are not "equity interests". This exclusion reflected a determination that only those investments which provide a plan with an opportunity to share in the success or failure of the entity to which the investment relates are likely to be vehicles for the indirect provision of investment management services. Under the proposal, "equity interests" were defined

generally as interests in an entity other than instruments which are treated as indebtedness under local law and which have no substantial equity features.

The second exclusion was for "publicly-offered" securities, that is securities that are registered under the federal securities acts and which are widely-held and freely transferable. The exclusion did not extend to securities that are offered primarily to tax exempt investors.

The third exclusion was for entities in which there was no "significant" plan investment. This exclusion was intended to deal with investments in entities in which there has been no special solicitation of plan investors. Under the proposal, plan investment was "significant" if ERISA plans and certain other kinds of benefit plans own more than 20 percent of any class of outstanding equity interests in an entity.

The fourth exclusion related to "operating companies"—companies that are primarily engaged in the production or sale of a product or service other than the investment of capital. The proposal also specifically described certain "real estate operating companies" and "venture capital operating companies" which were treated as operating companies.

The proposed regulation also provided that the assets of certain entities would always include "plan assets." These included bank collective trust funds, most insurance company separate accounts and entities that are wholly owned by plans. The proposal also provided that the assets of entities, other than insurance companies licensed to do business in a state, that are established for the purpose of providing benefits to participants of investing plans would include plan assets. This provision was intended to apply primarily to so-called "multiple employer trusts."

As proposed, the plan assets regulation would have been effective 90 days after it was published in final form. Under a transitional rule, however, the regulation would not apply to entities which accepted no new plan investments after June 30, 1986.

The Final Regulation

* * *

IX. Revision and Clarification of Interpretive Bulletin 75-2

As indicated in the preamble to the proposed regulation, the Department has revised Interpretive Bulletin 75-2 to coordinate it with the final regulation. As revised, the interpretive bulletin indicates that the rules established by the final "plan assets" regulation apply only for purposes of identifying plan assets on or after the effective date of the regulation and that the interpretive bulletin is effective for periods prior to that date and for investments that are subject to the transitional rule.

The remainder of the Interpretive Bulletin which discusses certain prohibited transactions under section 406 of ERISA (and section 4975 of the Code), is not affected by the final "plan assets" regulation. Also, the Department notes that the portion of Interpretive Bulletin 75-2 dealing with contracts or policies of insurance is not affected by the regulation being issued here.

The Department does not intend to effect any substantive change in the rules in the interpretive bulletin by making these revisions.[43]

* * *

[43] In this regard, the Department notes that the final paragraph of Interpretive Bulletin 75-2 states that the Department would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act. However, it is the Department's view that the mere fact a fiduciary makes or retains an investment in a corporation or partnership which does not hold plan assets under the final regulation does not mean the fiduciary has engaged in a transaction for the purposes of avoiding the application of the fiduciary responsibility rules within the meaning of the final paragraph of Interpretive Bulletin 75-2.

(2)

No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

HARRIS TRUST AND SAVINGS BANK, As Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent Harris Trust and Savings Bank[1] opposes the petition for a writ of certiorari of petitioner John Hancock Mutual Life Insurance Company ("Hancock" or "Petitioner").

[1] The party to this brief, Harris Trust and Savings Bank, is acting as a party to this action only in its capacity as Trustee of the Sperry Master Retirement Trust No. 2 (and of its successor, the Unisys Master Trust) (collectively, the "Plan") and is not otherwise affected by the outcome of this litigation. The Bank of Montreal is a parent of Harris Trust and Savings Bank. Petitioner Hancock is a mutual insurance company; it does not have any parent companies or subsidiaries to list pursuant to Rule 29.1. Respondent is not aware of any other parent companies or subsidiaries to list pursuant to Rule 29.1.

As set forth in the argument below, the Second Circuit correctly concluded that certain assets held by Hancock in its general account by virtue of the group annuity contract issued to Respondent known as "GAC 50" are "plan assets" which subject Hancock to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").[2]

Summary of Argument

The decision below accords with the plain language and legislative history of ERISA with respect to the applicability of § 1101(b)(2) to general account funds.[3] Although the decision below conflicts with an earlier decision of the United States Court of Appeals for the Third Circuit, the lack of decisions by other circuit courts on this issue favors denial of the petition for a writ of certiorari in this case, in order to permit further development of the law and the emergence of a satisfactory majority view among the lower courts. Moreover, denial of the petition may permit the Third Circuit to reconsider its decision in view of the fact that the Third Circuit's decision relied primarily on the decision of the District Court in this case, which the Second Circuit reversed. Finally, because the decision of the Third Circuit did not impose any duties upon petitioner which are inconsistent with the duties imposed by the Court below, petitioner can comply with the order of the Court below without violating any order of the Third Circuit or any other federal court.

[1] For the sake of brevity, inaccuracies in Petitioner's Statement of the Case are addressed in the Argument section of this Brief.

[3] By means of a cross-petition, Respondent seeks review of two other aspects of the ruling below with respect to the applicability of ERISA to insurance general account contracts, in the event Hancock's petition is granted.

ARGUMENT

I.

THE CIRCUIT COURT CORRECTLY CONCLUDED THAT HANCOCK IS AN ERISA FIDUCIARY WITH RESPECT TO FREE FUNDS WHICH ARE NOT ASSOCIATED WITH GUARANTEED BENEFITS

GAC 50 has two parts; one arguably provides guarantees, the other, as Hancock admits, provides no guarantees. As to this second part of the Contract, which refers to the "free funds," the Circuit Court correctly observed that "[a]lthough Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides." A-8 to A-9[4]. The decision of the court below is fully supported by the language and legislative history of ERISA, decisional law, and by rulings of the Department of Labor ("DOL").

A. ERISA Exempts Pension Plan Assets From Fiduciary Rules Only "To The Extent" They Support Guaranteed Benefits

ERISA defines a fiduciary as:

> [A] person is a fiduciary with respect to a plan to the extent . . .he exercises any discretionary authority or discretionary control respecting management of such plan or *exercises any authority or control respecting management or disposition of its assets* . . .

29 U.S.C. § 1002(21)(A) (emphasis added). Hancock's status as a fiduciary as to the plan's assets held in its general account turns upon whether the assets - as to which Hancock unquestionably exercises sufficient control and authority to render it a fiduciary

[4] "A-" refers to the pages of the Appendix annexed to Hancock's Petition for Writ of Certiorari filed with the Court on December 22, 1992.

- are "plan assets" under ERISA, a term not defined in the statute. See 29 U.S.C. § 1001 *et seq.*

Congress adopted a limited "safe harbor" provision in ERISA for pension fund assets held in insurance company general accounts:

> In the case of a plan to which a *guaranteed benefit policy* is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, *solely* by reason of the issuance of such policy, be deemed to include any assets of the insurer.

29 U.S.C. § 1101(b)(2) (emphasis added).[5] "Guaranteed benefit policy" is defined in the statute as "an insurance policy or contract *to the extent that* such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B) (emphasis added).

In its Petition, Hancock argues that § 1101(b)(2) exempts the *entirety* of a contract from ERISA's fiduciary strictures whenever the contract provides for *any* guaranteed benefits. Petition at 5. In enacting ERISA, however, Congress intended to make a distinction between insurance company general account contracts (or portions thereof) which truly guarantee benefits to retirees, and those, like GAC 50, which participate in the insurer's investment experience. The Second Circuit correctly held that "a contract is a guaranteed benefit policy only 'to the extent that' it provides for benefits that an insurer guarantees." A-8.

The ERISA Conference Report echoes this principle:

> If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then *the variable part of the policy and assets attributable thereto* are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

[5] A provision in the Senate Bill would have explicitly exempted *all* assets held in general accounts from ERISA's fiduciary duty provisions. *See* S.4, 93d Cong., 1st Sess. § 511 (1973), *reprinted in* 1 Legis. Hist. of ERISA at 170 (Comm.

(Footnote continued)

H. Rep. No. 93-1280, 93rd Cong., 2d Sess. (1974), *reprinted* in 1974 U.S. Code Cong. & Admin. News 5038, 5077 (emphasis added) ("ERISA Conf. Rep.").

The crucial question in this case is whether, in determining if the assets invested by the Plan are "plan assets," the availability of funds for benefits is dependent upon Hancock's success or failure as an investor, rather than upon any role it may have as an insurer. Following this standard, the free funds held in GAC 50's PA Fund are clearly "plan assets."

B. The Seventh Circuit And The *Jacobson* Court Correctly Read ERISA As Protecting Contracts Like GAC 50

In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 327 (7th Cir. 1983), the Seventh Circuit recognized that group annuity contracts such as GAC 50 can be divided into guaranteed and non-guaranteed aspects for purposes of an ERISA analysis. In *Peoria*, the Seventh Circuit concluded that the non-guaranteed portion of the contract was governed by ERISA.

Peoria involved a deposit administration fund ("DA Fund") in which pension funds were "commingled for investment purposes with the funds of other customers of the insurance company, in much the same way as investments of different investors are pooled in a mutual fund or common trust fund, in order to obtain diversification while minimizing brokerage and management costs." 698 F.2d at 322. Once an employee retired, annuities were purchased and the purchase price for such annuities was removed from the DA Fund account. No payments to beneficiaries were ever made from the DA Fund.

In such circumstances, the Seventh Circuit held that, while the funds in issue were kept in the DA Fund, the contract was in a variable accumulation phase and did not constitute a "guaranteed benefit policy," because the insurer had investment discretion and the results of that investment discretion would determine the amount of funds available to the pension plan:

Print 1976). This provision was deleted and replaced by the more limited "guaranteed benefit policy" exemption. 29 U.S.C. § 1101(b)(2).

> The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to [the insurance company] to manage with full investment discretion, subject only to a modest income guaranty. If the pension plan had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act, and that is essentially what the Trustees did during the accumulation phase of the contract with [the insurance company].

698 F.2d at 327.

The principles articulated in *Peoria* have also been applied in the context of a contract nearly identical to GAC 50. *Jacobson v. John Hancock Mut. Life Ins. Co.*, 655 F.Supp. 1290, withdrawn pursuant to settlement, 662 F. Supp. 1103, 1112-13 (D. Conn. 1987). In *Jacobson*, the pension plan trustees alleged and the Court held that Hancock was an ERISA fiduciary with respect to funds held under a contract which were not associated with guaranteed benefits.

C. The District Court's Decision And The Third Circuit's Decision In *Mack Boring* Misconstrued The Statutory Language And Congressional Intent

The Third Circuit in *Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F.2d 267 (3rd Cir. 1991),[6] adopted the decision of the District Court in this case. Like the District Court below, the Third Circuit essentially read the language "to the extent that" out of the definition of "guaranteed benefit policy." The Third Circuit thus effectively extended the exemption to the totality of *any* contract under which *any* benefits are guaranteed, even where the guaranteed

[6] The *Mack Boring* contract was a deposit administration contract, the same as the *Peoria* contract in all material respects. *Compare Peoria*, 698 F.2d at 322-23, *with Mack Boring*, 930 F.2d at 268-69.

aspect of the contract is dwarfed by its investment component.[7] Thus, *Mack Boring* in essence held that the term "guaranteed benefit policy" means "an insurance policy or contract that provides for benefits the amount of which is guaranteed by the insurer." 930 F.2d at 270-72 (citation omitted).

Congress understood, and the "to the extent that" language of the exemption makes clear, that there can be instances where a single contract can have exempt "guaranteed" aspects while at the same time having non-exempt aspects as to which the insurance company is an ERISA fiduciary. *See* ERISA Conf. Rep. at 5077. *Mack Boring* ignored the "to the extent that" limitation and placed ERISA's fiduciary protections on an "all or nothing basis" in direct conflict with the clear dictionary meaning of "to the extent that."

Mack Boring also ignored explicit language in 1101(b)(2) and the basic intention of Congress in enacting ERISA when it decided that the fluctuation resulting from an insurer's investment experience was irrelevant. The Third Circuit appears to believe that if a pension plan provides for defined benefits, and the employees' benefits are therefore fixed and secured (paid either by the employer, the Trust Fund or the insurer), the success or failure of the plan's investments is of no significance to the plan's beneficiaries. In other words, the Third Circuit appears to view ERISA as solely protecting the payment of benefits to Plan participants, and not protecting the Plan and Plan assets which ensure the payment of such benefits.

D. The Interpretation Argued By Hancock Violates Numerous Rules Of Statutory Construction

The interpretation of § 1101(b)(2) argued by Hancock fails to give effect to the words "to the extent that" in violation of

[7] As stated by the Second Circuit, "[the *Mack Boring*] court in effect exended the statutory exemption to the entirety of any contract under which any benefits are guaranteed, so that the exemption would apply regardless of the apportionment between the guaranteed component and the investment component of the contract." A-11.

well-recognized rules of statutory construction. This interpretation would create an exemption which has already been rejected by Congress. A blanket exemption for *all* general account contracts had been part of the Senate version of the draft legislation, but was deleted in Conference Committee and does not appear in the law as eventually enacted by Congress and signed by the President. *Compare* S.4, 93d Cong., 1st Sess. § 511 (1973), *reprinted in* 1 Legis. Hist. of ERISA at 170 (Comm. Print 1976) *with* 29 U.S.C. § 1101(b)(2)(B).[8] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be *presumed that the limitation was not intended*." *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (emphasis added) (citing *Arizona v. California*, 373 U.S. 546, 580-81 (1963)).[9]

Nevertheless, Petitioner relies, as it did in the courts below, on a "Staff Summary" to support its argument that Congress did not mean what it said when it stated in § 1101(b)(2)(B) that group annuity contracts were exempt from ERISA's fiduciary rules only "to the extent" they provide guaranteed benefits. Petition at 22-24.

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[8] The Senate version of ERISA provided that the fiduciary provisions would not apply to "funds held by an insurance carrier unless that carrier holds funds in a separate account." The final version expanded coverage by exempting only "guaranteed benefit policies," and then only "to the extent that" such policies were "insurance contracts or policies" that provided for benefits which were "guaranteed" by the insurer. *Id.*

[9] The construction of the guaranteed benefit policy exemption advanced by Petitioner also violates the well-recognized canon of statutory construction that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23, quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

In § 1101(b)(1), Congress explicitly exempted *all pension funds* invested in mutual funds. That section reaches "*any* security issued by an investment company registered under the Investment Company Act of 1940." By contrast, § 1101(b)(2)(B) is much narrower, demonstrating that, when Congress chose to, it knew how to draft a broad exemption, but *chose not to* in rejecting the Senate's version of the exemption and adopting § 1101(b)(2)(B).

Petitioner's argument is that, although (i) the House Bill was silent with respect to coverage of general account contracts, (ii) the Senate Bill specifically excluded all general account contracts, and (iii) the statute as enacted does not contain the words "general account" and exempts only "guaranteed benefit policies," this Court should interpret § 1101(b)(2)(B) as if it consisted of the deleted language of the Senate Bill. Hancock's sole basis for this argument is that a footnote in a "Staff Summary" stated that the policies of the House and Senate were the same with respect to general account contracts.[10]

This "Staff Summary" has absolutely no probative value in the construction of § 1101(b)(2)(B). Not only was it never endorsed or adopted by either House of Congress, it conflicts with the statute's language. "Not even formal reports, much less statements of individual committee members, can be resorted to for the purpose of construing a statute contrary to its plain terms." *Committee for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 308 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976)(citation omitted).

Statements not adopted or made by members of Congress or included in official House or Senate reports have little or no probative value. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986). In *Kelly v. Robinson*, this Court declined to accord any significance to comments in a Bankruptcy Law Commission report where "none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports." *Id.* The "Staff Summary" that Hancock urges this Court to rely upon has far less probative value than the commission report that this Court declined to give any weight in *Kelly*.

The only rational reading of the legislative history is that, while the Senate intended to completely exempt general account assets and the House intended no such exemption, the Conference Committee compromised by taking the intermediate

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[10] It is impossible to determine whether the "Staff" which prepared this "Summary" was from the House, the Senate, a subcommittee or a Committee. It is not even clear that the material was prepared by Congressional Staff.

position reflected in § 1101(b)(2)(B). Both the statutory language and logic dictate that § 1101(b)(2)(B) be interpreted consistent with this history.[11] Furthermore, Petitioner has never provided any explanation as to why the Senate language was dropped if the intention of Congress never wavered from the Senate's approach. Cf. *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

Petitioner also argues that the existence of state regulation of general accounts is evidence of Congress' intent not to regulate assets in such accounts. Petitioner argues, as it did in the courts below, that state insurance laws somehow pre-empt ERISA, despite the clear evidence discussed above demonstrating that Congress intended, by means of ERISA, to regulate insurance companies in connection with their handling of pension plan investment funds.[12] Indeed, petitioner goes so far as to argue that this Court, in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), applying the analysis in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), concluded that "when a state insurance regulation collides with ERISA, ERISA must give way to state regulation." Petition at 19.

Petitioner's reliance upon this Court's decisions in *Metropolitan Life* and *FMC Corp. v. Holliday* for this argument is misplaced. In *Metropolitan Life*, appellant Metropolitan Life was seeking, through reliance on ERISA's pre-emption provisions, to escape a Massachusetts insurance law provision which required minimum mental health benefits in all group health insurance policies for Massachusetts residents. This state law did

[11] Courts have long recognized that "statutes are frequently the product of compromise, and a legislative compromise would be undone if a court enforced the maximum position of one of the negotiating factions." *Harmon v. Teamsters*, 832 F.2d 976, 979 (7th Cir. 1987) citing *Rodriguez v. United States*, 480 U.S. 522 (1987). Hancock asks this Court to do exactly that, that is, enforce the Senate position, when the enacted language shows clear evidence of a compromise.

[12] Petitioner's argument on this point renders incomprehensible the decision by Congress to create a limited "safe harbor" for pension funds used to purchase a "guaranteed benefit contract." If Congress, as Petitioner claims, did not intend to regulate the "business of insurance" as it related to group annuity contracts, Congress' decision to include ERISA's limited "safe harbor" for certain types of insurance general account contracts makes no sense.

not conflict with any ERISA requirements; thus, this Court never faced the issue of conflicting provisions in *Metropolitan Life*.

This Court in *Metropolitan Life* merely held that Metropolitan Life and ERISA-covered plans which purchased group health policies from Metropolitan Life would be governed by *both* ERISA and the Massachusetts minimum benefit requirements. The Court concluded:

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. . . . We also are aware that appellants' construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress.

Metropolitan Life, 471 U.S. at 747. Thus, while self-insured plans are subject only to ERISA, plans which purchase benefits from insurance companies are subject to *both* ERISA and state insurance law. *See* 29 U.S.C. § 144(b)(2).[13]

Indeed, this Court expressly rejected the argument that state insurance law might somehow preempt ERISA in a companion decision to *Metropolitan Life*, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, this Court held that where a state law might arguably "regulate[] insurance" and would be "saved" from pre-emption under ERISA's savings clause but would also undermine a clearly expressed intention of Congress in enacting ERISA, the state law is pre-empted. 481 U.S. at 56-57. *See also*, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

[13] The district court below readily dispatched this argument on this basis. See A-30 ("If a state statute meets the *Metropolitan Life* test, and thus fits ERISA's savings clause, the state law applies to the plan at issue. But ERISA applies to the plan as well").

Petitioner's reliance upon *FMC Corp. v. Holliday* is equally misplaced. In that case, this Court once again dealt with ERISA's "deemer" clause, concluding that Congress had intended "to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of [ERISA's] saving clause." This Court, however, certainly did *not* decide in *FMC Corp. v. Holliday* that insurance companies falling outside the scope of ERISA's "deemer" clause were exempt from ERISA. Indeed, countless courts have concluded, following this Court's *Pilot Life* decision, that ERISA's "saving" clause has no application where a state law provision conflicts with ERISA. *See, e.g., Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 764 (5th Cir. 1989).

In fact, there are numerous examples of instances in which insurance company practices are subject to dual regulation, and in which potential conflicts between the requirements of state law and ERISA are resolved by means of Prohibited Transaction Exemptions. For example, the extensive state laws and regulations governing separate accounts have not prevented insurance companies from complying with ERISA with respect to such accounts. *See e.g.*, N.Y. Ins. L. § 4240 (McKinney 1991); N.J.S.A. 17B:28-1 to 17B:28-15; 11 Codes, Rules and Regulations of the State of New York, Chapter III, Part 50 "Separate Accounts and Separate Account Annuities." Moreover, in the context of separate accounts, the insurance industry has made ample use of the administrative procedures that ERISA provides. *See, e.g.*, DOL Prohibited Transaction Exemption 81-82, 46 Fed. Reg. 46443 (1981); 88-92, 53 Fed. Reg. 38 (1988).

E. Regulatory Pronouncements Also Support A Finding That Hancock Is A Fiduciary

Petitioner argues that the Second Circuit's decision "conflicts with 18 years of consistent administrative pronouncements . . . by the Department of Labor." Petition at 3. Had the DOL taken such a position, it would have contradicted the statute. Moreover, DOL pronouncements do *not* support Petitioner's claim.

1. *DOL Interpretive Bulletins*

In the court below, Hancock argued that a DOL "Interpretive Bulletin Relating to Prohibited Transactions 75-2" ("IB 75-2") supported its position.[14] However, IB 75-2 is the DOL's interpretation of the scope of the *prohibited transaction* provisions of ERISA. 29 U.S.C. § 1106. If anything, IB 75-2(b) provides a "safe harbor" for certain contracts from ERISA's *prohibited transaction* provisions, not from the statute's central fiduciary responsibility provisions. *Compare* 29 U.S.C. § 1104 and §§ 1106, 1108. This point was well made in the *A.A.P.* district court opinion. *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1184-85 (N.D. Ill. 1989), *aff'd*, 941 F.2d 561, *reh'g and reh'g en banc denied*, 1991 US App. LEXIS 23027 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1182 (1992). There, the district court rejected the insurance company's reliance upon IB 75-2(b) as a complete exemption from ERISA. *See A.A.P.*, 729 F. Supp. at 1185. Similarly, the Second Circuit found that "[t]here is no inconsistency in considering certain assets to be plan assets for general fiduciary duty purposes but not for prohibited transaction purposes." A-13. *See also Jacobson v. John Hancock Mut. Life Ins. Co.*, 662 F. Supp. 1103, 1110 (D.Conn. 1987).

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[14] IB 75-2 reads in relevant part:

> (b) Contracts or policies of insurance. If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company, will not solely because the plan has been issued such a contract or policy of insurance be a prohibited transaction.

29 C.F.R. § 2509.75-2(b) (orig. publ. Feb. 6, 1975, republished without change to paragraph (b) on Nov. 13, 1986, 51 Fed. Reg. 41262, 41280). IB 75-2 has never been published for notice and comment pursuant to the Administrative Procedure Act's rulemaking provisions and thus does not have the force of law. *See* 5 U.S.C. § 553.

The Second Circuit and *A.A.P.* district court analysis is supported by the DOL. Discussing the differences between IB 75-2 and its final "Plan Asset Regulation," the DOL in 1986 stated that the Plan Asset Regulation was broader because it determined the reach of all of ERISA's fiduciary responsibility requirements, not just the prohibited transaction rules. Final Regulation Relating to the Definition of Plan Assets, 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986).

2. *The "Plan Asset" Regulation*

The history of the "Plan Asset Regulation", 29 C.F.R. § 2510.3-101 ("PAR"),[15] also shows that the DOL does not view insurance company general accounts as exempt from the reach of ERISA. Although a proposed PAR would have given the insurance industry substantial relief because it governed not only prohibited transactions but also the issue of what constitutes a plan asset and thus who is a fiduciary under ERISA, 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986), this proposal was withdrawn by the DOL in 1985 and no similar provision has ever been repromulgated by the DOL. In fact, in November 1986, the DOL adopted the final PAR without providing a "safe harbor" or, indeed, any "harbor" at all for insurance company general accounts. 29 C.F.R. § 2510.3-101 (1986).

3. *DOL Advisory Opinions*

There are other DOL rulings which support the conclusion that Hancock is a fiduciary with respect to funds not associated with guaranteed benefits. For example, the DOL has clearly employed the distinction between "guaranteed" and variable payments to plans to distinguish between funds which are plan assets and those which are not. The DOL has stated,

> [A] separate account would not hold "plan assets" for purposes of the fiduciary responsibility provisions of ERISA if it is maintained by an insurance company solely in connection with its fixed contractual obligations and if neither the ***amount payable to*** (or credited to) ***the plan*** or to any participant or beneficiary of the plan (including an annuitant) ***is affected in any way by the investment performance of the separate account***. . . . We note, however, that a conventional separate account (which holds contributions received from a plan and provides for the crediting of income on such amounts based upon the investment experience of the separate account) ***would not be considered to be maintained in connection with a fixed contractual obligation of the insurance company merely because assets of the separate account are ultimately applied to provide fixed annuities to participants***, and the assets of such a separate account would be considered to be plan assets.

[15] 29 C.F.R. § 2510.3-101 (final PAR discussed in detail and published at 51 Fed. Reg. 41262 (No. 219)(Nov. 13, 1986)).

DOL Advisory Opinion 83-51A (Sept. 21, 1983) (emphasis added).

As the Circuit Court below correctly recognized, by means of Advisory Opinion 83-51A, the DOL

> thus appears to take the position that "plan assets" for the purpose of the fiduciary responsibility provisions of ERISA do not lose their status as such merely because the ultimate use of the account may be to provide fixed annuities, where the plan assets are affected by investment performance.

A-12. Thus, the crucial distinction is whether the insurance company exercises *investment control* and whether the insurance company's investment performance affects the amount of funds available to the Plan and its participants.

Similar reasoning appears in Advisory Opinion 78-8A. There, the DOL stated that:

> The [Conference Report on section 1101(b)(2) of ERISA] evidences a congressional intent that when an insurance company provides investment advice which determines the rate of return to the plan and its participants, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary responsibility provisions of the Act.

DOL Advisory Opinion 78-8A (Mar. 13, 1978).

The distinction, therefore, raised by Hancock between general and separate accounts is irrelevant for identifying plan assets for purposes of § 1101(6)(2). As correctly stated by the Second Circuit: "The fact that all the assets of GAC 50 are held in Hancock's general account is not significant in view of Hancock's discretionary authority over the non-guaranteed phase of the contract." A-10,11. *See Jacobson*, 662 F. Supp. at 1109.

II.

HANCOCK CANNOT NOT ESCAPE ITS DUTIES UNDER ERISA BY RELIANCE ON A "PARADE OF HORRIBLES"

In its Petition, as it did below, Hancock argues that insurance company general accounts are exempt from ERISA simply because complying with ERISA would be a hardship. For example, in its Petition, Hancock argues that the Second Circuit's decision "has caused substantial confusion and uncertainty in the insurance industry and threatens disruption of longstanding insurance company business practices." Petition at 3. As this Court stated recently, "[W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it." *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

Similarly, the Second Circuit was told repeatedly that if Hancock is deemed a fiduciary "absurd and unmanageable

consequences" with "extreme implications" would follow. The fact that Hancock would have to comply with the "prudent man" rule is neither absurd nor extreme. The only consequence of the decision below would be to force Hancock to bring its conduct into compliance with ERISA's fiduciary provisions.

Moreover, since 1975, neither Hancock nor the insurance industry attempted to bring general accounts into compliance with ERISA. As aptly stated in *Jacobson*:

> An insurer may not use a general account to harbor a plan's assets, create a potential for conflict and thus claim relief from a fiduciary's obligations. Rather, so long as the funds from a plan are not converted to a fixed, guaranteed obligation but remain subject to fluctuation resulting from the insurer's investment performance, the funds are plan assets for which the insurer must be held accountable as a fiduciary.

Jacobson v. Hancock Mut. Life Ins. Co., 655 F. Supp. 1290, 1299 (D.Conn. 1987).

Hancock also ignores the fact that the insurance industry was not alone in conducting elements of its business in a manner which was made unlawful by ERISA. Numerous industries had to radically change the way they handled pension funds as a result of the enormous upheaval created by ERISA. The only difference between the insurance industry and these other industries was that the insurance industry chose not to comply with the statute with respect to its general account contracts.

Hancock claims that the legislative history of ERISA is devoid of any indication that Congress intended to subject insurance company practices to ERISA. In its Petition to this Court, Hancock goes so far as to argue that the Second Circuit's decision violated "the national policy underlying the McCarran-Ferguson Act." Petition at 11. This reference echoes an argument advanced by Petitioner in the courts below, that the McCarran-Ferguson Act preempted ERISA. The legislative history, however, clearly demonstrates that Congress was fully aware that ERISA's fiduciary responsibility provisions would have a substantial

impact upon until-then accepted practices in the *insurance*, banking and securities industries:

> The Committee is aware that there exist various established and recognized practices which are accepted in commercial banking, trust and *insurance companies*, investment companies and other advisors in connection with employee benefit plans. However, notwithstanding current acceptance of such practices, the Subcommittee has found it difficult to establish definitive criteria concerning those practices which should be specifically proscribed. This difficulty was weighed . . . against the overriding need to protect workers' pension funds, and [the Committee] concluded that the latter's interest out-weighed any current attempt to define all practices and relationships which constitute not only actual but real potential threats to the security and preservation of the pension funds.

S. Rep. No. 93-127, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4868 (emphasis added).

In order to ameliorate this problem, ERISA contains long transition periods and administrative procedures under which affected parties can obtain relief. See 29 U.S.C. §§ 1108, 1114.

> [T]he Secretary of Labor, is authorized by the Act to waive any proscribed practice as long as it is consistent with the purposes of the Act and determined to be in the interests of pension plan participants. The Committee is not unaware of the possible impact of these prohibitions, and accordingly has made provision in the bill for an adequate transition period of 3 years, or longer, if warranted.

S. Rep. No. 93-127 (emphasis added); *see also* ERISA Conf. Rep., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038,

5089-90 ("The conferees recognize that some transactions which are prohibited . . . nevertheless should be allowed in order not to disrupt the established business practices of financial institutions . . . consistent with adequate safeguards to protect employee benefit "plans").[16] Notwithstanding this provision, Hancock and the insurance industry have focused their efforts on avoiding any application of ERISA to general accounts, and have not sought administrative relief aimed at enabling them to meet ERISA's requirements without the "drastic" consequences they predict.[17]

[16] These portions of the legislative history also demonstrate that the Third Circuit was incorrect in stating that Congress did not make it clear that it understood the disruptions that ERISA would cause to insurance practices. See *Mack Boring & Parts v. Meeker Sharkey Moffitt, Actuarial Consultants*, 930 F.2d 267, 275 n.17 (3d Cir. 1991). To paraphrase this Court, with respect to ERISA's impact, Congress barked. *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 n.23 (1991).

[17] For example, a leading treatise in the field makes clear that segmentation in general accounts is available to provide the administrative tracking and accountability already available to trusts and separate accounts:

> By [segmentation], the insurer can allocate general account assets to various lines of business or to defined classes of contract holders by merely setting up and maintaining *memorandum* accounts. The segmentation must be carried out and maintained on an equitable and consistent basis. . . .
>
> Segmentation is a powerful and flexible tool for asset management and allocation of investment earnings. It permits the matching of assets and liabilities in a way not possible under other approaches. Assets can be segmented in ways to meet the differing investment objectives of various groups of contract holders.

McGill & Grubbs, *Fundamentals of Private Pensions* at 502 (6th ed. 1989).

III.

BECAUSE THE CIRCUIT COURT WAS CLEARLY CORRECT, AND THERE HAS NOT BEEN SUFFICIENT DEVELOPMENT OF THE LAW IN OTHER CIRCUITS, CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

As demonstrated above, the Circuit Court was clearly correct when it concluded that the "free funds" under GAC 50 are plan assets as to which Hancock is an ERISA fiduciary. Although the ruling below conflicts with the Third Circuit's decision in *Mack Boring*, there are compelling grounds for denying Hancock's petition.

First, although there is a conflict between the Second and Seventh Circuits, on the one hand, and the Third Circuit, on the other hand, this conflict will not result in the imposition of inconsistent duties on petitioner or other similarly situated insurance companies. While the Second Circuit's decision requires petitioner to treat "free funds" under GAC 50 as plan assets as to which it is a fiduciary, the Third Circuit, in *Mack Boring*, did not prohibit such treatment of "free funds." Thus, there are no inconsistent obligations on the insurance company and no great urgency in deciding this issue and resolving the conflict between a limited number of circuit courts.

Second, this is a case in which further development of the law in other circuit courts may permit a majority view to emerge, thereby clarifying the issues for review. Moreover, declining certiorari review in the case at bar may permit the Third Circuit to reconsider its own view in light of the reversal of the district court by the Second Circuit — the chief authority upon which the Third Circuit relied in *Mack Boring*. *Cf.* Stern, Grossman & Shapiro, *Supreme Court Practice*, at 199 n.30 (6th ed. 1986).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

January 21, 1993

Respectfully submitted,

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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 22, 1993

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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner John Hancock Mutual Life Insurance Company ("Hancock")[1] submits this Reply Brief in response to the Brief in Opposition to the Petition for a Writ of Certiorari filed by Respondent Harris Trust and Savings Bank ("Harris Trust").[2]

[1] The list of Parties provided in the Petition pursuant to Rule 29.1 continues to be correct as of the date hereof.

[2] References to pages of the Petition and of the Brief in Opposition are cited as "Pet." and "Opp. Br.", respectively, followed by the page number. References to pages of the Appendix to the Petition are cited herein as "A-", followed by the page number.

The Brief in Opposition does not in any way contradict Hancock's statement of the compelling reasons for granting the writ. It concedes that the Second Circuit's decision has caused confusion and uncertainty in the insurance industry, and it acknowledges both the conflict among the circuits and the public importance of this case. Far from providing a legitimate reason for denying the writ, therefore, the Brief in Opposition demonstrates why review should be granted.[3]

The need for the Court's immediate intervention is further underscored by the briefs *amicus curiae* submitted in support of the Petition by the State of New York ("NYS"), the National Association of Insurance Commissioners ("NAIC") and the American Council of Life Insurance ("ACLI").[4] These briefs establish what Harris Trust cannot seriously dispute — that the decision below will cause substantial upheaval in longstanding insurance industry practices and create dual and conflicting regulation of the business of insurance under state and federal law.

[3] The Brief in Opposition consists almost entirely of arguments on the merits. Opp. Br. at 3-16. It mischaracterizes the facts and legal issues involved, misconstrues the statutory text and legislative history, and misinterprets the pronouncements of the Department of Labor ("DOL"). Harris Trust's legal arguments, with which Hancock of course disagrees, are more appropriately placed before the Court once certiorari is granted. Accordingly, they are not addressed in this Reply Brief.

There is one inaccuracy in the Brief in Opposition, however, that is so egregious that Hancock is constrained to respond. In the opening sentence of its Argument, Harris Trust asserts that the contract at issue, GAC 50, has "two parts" and that Hancock "admits" that one of those "parts . . . provides no guarantees." Opp. Br. at 3. GAC 50 has no "parts," as that term is used by Harris Trust; moreover, the entirety of GAC 50 provides for guaranteed benefits, because all funds held under the contract are available to be used, at Harris Trust's option, to pay such benefits. Pet. at 5-6; 21-24. Hancock has never taken any position or "admitted" anything to the contrary.

[4] References to pages of the briefs *amicus curiae* are cited as "NYS Br.", "NAIC Br." and "ACLI Br.", respectively, followed by the page number.

I.

HARRIS TRUST RECOGNIZES THAT THE SECOND CIRCUIT'S DECISION WILL SEVERELY DISRUPT THE INSURANCE INDUSTRY

In its Brief in Opposition, Harris Trust does not dispute that the Second Circuit decision has caused substantial confusion and uncertainty in the insurance industry and threatens disruption of longstanding insurance company business practices. In fact, Harris Trust recognizes that compliance with the Second Circuit's decision will require the insurance industry to "radically change" the way it handles pension funds in its operations. Opp. Br. at 17.

NYS makes clear in its *amicus* brief why the changes required by the Second Circuit's decision would be radical indeed. These changes, in the State's words,

> will interfere with the nondiscriminatory treatment of policyholders and contractholders required by State law; . . . will interfere with the State's ability to ensure the financial stability of insurance companies operating in the State; and . . . will severely impair the administration of the insurance laws by insurance regulators.

NYS Br. at 3; *see also* NAIC Br. at 6.

Unable to deny the profound adverse effect of the decision below upon the insurance industry, Harris Trust proclaims instead that these consequences are both long overdue and, in any event, not relevant to this Court's consideration of the Petition. Opp. Br. at 16-17.[5] As the Petition and the briefs

[5] Harris Trust suggests that the disruption to the insurance industry could be avoided through "segmentation." Opp. Br. at 19 n.17. Because segmentation is only a means of assigning assets for income allocation purposes, however, it would not address Harris Trust's purported concerns. Under Harris Trust's view, particular General Account assets must be segregated and managed solely in the interest of a particular pension plan customer.

(Footnote continued)

amicus curiae point out, however, the decision of the Second Circuit cannot be reconciled with the McCarran-Ferguson Act, the language of ERISA, the intent of Congress or the interpretation of the statute by the DOL. Pet. at 16-24.

The Second Circuit's decision will eviscerate ERISA's "guaranteed benefit policy" exception and materially undermine the national policy underlying the McCarran-Ferguson Act. This disruption of the States' regulation of the business of insurance would necessarily have a drastic impact upon the allocation of regulatory responsibilities between the federal and state governments and upon the insurance industry.[6]

II.

HARRIS TRUST ADMITS THAT THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING THE QUESTION PRESENTED IN THE PETITION

Harris Trust admits that, as a consequence of the decision below, there is now a conflict between "the Second and Seventh Circuits, on the one hand, and the Third Circuit, on the other hand." Opp. Br. at 20. Harris Trust asserts, however, that denial of the writ "may permit the Third Circuit to reconsider its own

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Segmentation entails no such segregation of assets. Moreover, the segregation of a portion of an insurer's General Account assets for the exclusive benefit of particular policyholders conflicts with state statutory schemes for monitoring the solvency of insurers, *e.g.*, NYS Br. at 8-11, and would therefore undermine state evaluation of insurers' solvency, *e.g.*, NYS Br. at 12 n.14. State insurance laws would also be violated if an insurer were to manage General Account assets for the exclusive benefit of only some General Account contractholders or policyholders, *e.g.*, NYS Br. at 5-8. Additionally, segregation of an insurer's General Account would massively complicate state regulation of insurance, perhaps even necessitating a two-tiered regulatory regime, *e.g.*, NYS Br. at 11-12; *see also* ACLI Br. at 13 & n.18.

[6] Citing 29 U.S.C. §§ 1108 and 1114 and a truncated excerpt from the legislative history, Harris Trust claims that administrative relief is available under ERISA from the effects of the irreconcilable conflict between federal and state law created by the decision below. Opp. Br. at 18-19. Neither section on its face, however, applies to ERISA's fiduciary responsibility provisions under 29 U.S.C. § 1104, and Harris Trust does not identify any other provision of the statute by which such relief could be obtained.

view." *Id.* The only support Harris Trust provides for that speculation is the fact that *Harris I* (A-21 to A-62), a district court opinion in this case that was cited by the Third Circuit in *Mack Boring and Parts Corp. v. Meeker Sharkey & Moffitt*, 930 F.2d 267 (3d Cir. 1991), has now been overruled in part by the Second Circuit. *Id.*

Despite the Third Circuit's reference in *Mack Boring* to *Harris I*, that court conducted its own comprehensive analysis of the language of ERISA, the statute's legislative history and the DOL's subsequent administrative interpretations. Pet. at 12-13. Furthermore, the Third Circuit considered the profound consequences of applying ERISA's fiduciary responsibility provisions to an insurance company's General Account operations. Pet. at 13. There is simply no reason to believe that, after its own careful analysis, the Third Circuit would reconsider its view in *Mack Boring* based solely upon the far more limited analysis performed by the Second Circuit.

Indeed, the likelihood of reconsideration by the Third Circuit is made even more remote by the Second Circuit's express reliance upon the opinion in *Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), which was expressly rejected by the Third Circuit and was limited as a precedent by the Seventh Circuit in *Peoria Union* itself. Moreover, several district courts, both within the Third Circuit and elsewhere, have expressly relied upon *Mack Boring*'s analysis. *Bozeman v. Provident Nat'l Assurance Co.*, No. 90-2925-5 (W.D. Tenn. May 15, 1992) (WESTLAW, DCTU database) (following *Mack Boring* and rejecting *Peoria Union*); *Trustees of Laborers' Local No. 72 Pension Fund v. Nationwide Life Ins. Co.*, 783 F. Supp. 899 (D.N.J. 1992); *Fechter v. Connecticut Gen'l Life Ins. Co.*, 800 F. Supp. 182 (E.D. Pa. 1992) (decided after the Second Circuit's reversal of *Harris I*). The Second Circuit's contrary decision, however, apparently has not been followed by any other court. Review of the decision below ought not be denied based upon the remote possibility of reconsideration by the Third Circuit of its earlier comprehensive ruling.

III.

IT IS URGENT THAT THE CONFLICT AMONG THE CIRCUITS BE RESOLVED

While acknowledging the existence of a conflict among the circuits, Harris Trust makes the insupportable assertion that there is "no great urgency" in resolving that conflict. Opp. Br. at 20. The briefs *amicus curiae* refute that assertion, and it is controverted by Harris Trust's own arguments.

As the Petition points out — and Harris Trust does not dispute — the conflict among the circuits affects the management and administration of hundreds of billions of dollars of assets held in the General Accounts of insurance companies. These assets are held in connection with insurance contracts with pension plans covering almost 60 million persons. Pet. at 20. The briefs *amicus curiae* of NYS, the NAIC and the ACLI — which reflect the concern of insurance commissioners in every jurisdiction in the United States as well as of the insurance industry — underscore the urgency in resolving the conflict among the circuits and the looming conflict between federal and state law.

Harris Trust asserts that the conflict among the circuits should not result in "inconsistent obligations" for insurance companies, because "the Third Circuit, in *Mack Boring*, did not prohibit [the] treatment of 'free funds'" as plan assets. Opp. Br. at 20. Not only can that statement not be reconciled with any reasoned interpretation of the Third Circuit's decision — which holds that none of the funds held in an insurance company's General Account in connection with a guaranteed benefit policy are plan assets — it also fails to address the inability of an insurer to comply simultaneously with ERISA and state law. The *amicus* brief filed by NYS specifically identifies the "inconsistent obligations" that would be imposed on insurers as a result of the Second Circuit decision. NYS Br. at 2-3.

Harris Trust further asserts that the question presented in the Petition is one as to which "further development of the law in other circuit courts may permit a majority view to emerge, thereby clarifying the issues for review." Opp. Br. at 20. That argument is baseless. Harris Trust fails to identify any issue

presented in the Petition that would be clarified by additional lower court decisions. The conflict among the circuits on the question presented is stark and inescapable and can only be resolved by this Court.

Harris Trust's other arguments also subvert its plea for delay. In Harris Trust's view, Congress intended ERISA to supplant state regulation of insurance companies with respect to participating group annuity contracts issued to pension plans. Opp. Br. at 10. If that were the case, however, the burden of regulating the business of insurance with regard to typical General Account group annuity contracts like GAC 50 would fall squarely on the shoulders of the federal courts, a proposition that finds absolutely no support in the legislative history of ERISA. That is itself a reason why the writ should be granted.

This Court has recognized that insurance companies have a "vital" interest in being able to rely upon existing law to structure their business operations to accommodate risks over long periods of time. "Drastic changes in the legal rules governing . . . insurance funds" impair that stability and upset the premises upon which the business has been conducted. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246-47 (1978). As the briefs *amicus curiae* attest, the decision below has cast doubt upon fundamental legal principles governing the business of insurance upon which the entire industry has relied. Delaying review of the question presented in this case will only cause further confusion, uncertainty and disruption.

Conclusion

The Petition for a Writ of Certiorari should be granted.

February 22, 1993

Respectfully submitted,

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No. 92-1074 (3)

In The

Supreme Court of the United States

October Term, 1992

John Hancock Mutual Life Insurance Company,
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v.

Harris Trust and Savings Bank,
as Trustee of the Sperry Master Retirement Trust
No. 2,
Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF *AMICUS CURIAE*
AMERICAN COUNCIL OF LIFE INSURANCE
IN SUPPORT OF PETITION FOR
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INTEREST OF *AMICUS CURIAE*[1]

The American Council of Life Insurance (the "Council") is a national trade association representing 611 life insurance companies which, in the aggregate, have approximately 92% of the assets of all United States life insurance companies and 98% of the insured pension business. By virtue of their sales of pension and annuity contracts to employee benefit plans, these companies play a major role in the nation's retirement system. The Council estimates that, by year-end 1991, retirement benefits covering over 59.3 million participants and beneficiaries under private pension plans in the United States were funded through contracts issued by life insurance companies. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book* 54-60 (1992).

Of a total $746 billion of reserves held by life insurance companies under contracts with retirement plans as of year-end 1991, about $565 billion were held under "General Account contracts." *Id.* at 58. Money paid to an insurance company under such a contract becomes part of the insurer's general corporate assets (usually referred to as the insurer's "General Account assets"), which are derived from all of its different classes of business and which, accordingly, are managed for the collective benefit of all policyholders.[2] In this case, the Second Circuit ruled that

[1] Petitioner and Respondent have consented to the filing of this brief. The parties' consent letters have been filed with the Clerk.

[2] Assets in an insurer's General Account include its buildings, equipment and other operating assets as well as its stocks, bonds, real estate and other investment assets. From its General Account, the insurer pays all of its operating expenses (*e.g.*, salaries, rent, taxes, etc.), all of its obligations to general creditors, and all of its obligations to its life, health, annuity and other policyholders (other than policyholders participating in separate accounts). In most cases, the greatest number of policyholders are individuals and entities other than employee benefit plans. An insurer also pays dividends from this account to policyholders, and, in the case of stock companies, to shareholders. General Account assets are not segregated for the benefit of particular contracts, contractholders or lines of business; all assets are available to satisfy each

the general fiduciary responsibility provisions of the Employee Retirement Income Security Act ("ERISA") were applicable to assets in an insurer's General Account. That ruling directly conflicts with a recent holding of the Third Circuit. It also directly conflicts with nearly two decades of Department of Labor ("DOL") pronouncements that the management of General Account assets is not subject to ERISA's fiduciary rules.

The Council has a vital interest in this case. The ruling of the Second Circuit subjects insurers to rules which would literally require them to manage General Account assets solely in the interests of and for the exclusive purpose of providing benefits to participants and beneficiaries of its ERISA retirement plan contractholders. The Third Circuit has recognized that such a result is incompatible with the customary management of General Accounts for the collective benefit of all policyholders. It has further recognized that such a result is incompatible with state insurance laws which were specifically exempted from ERISA's broad preemption provision and which require an insurer to deal fairly and equitably with all policyholders as a group. The decision of the Second Circuit thus leaves the insurance industry exposed to challenges to longstanding business practices that are required in order to comply with state insurance regulatory standards. In addition, the conflict among the Circuits leaves the insurance industry in an untenable state of uncertainty regarding the nature of its obligations with respect to hundreds of billions of dollars of assets held under General Account contracts issued to employee benefit plans and non-ERISA covered policyholders.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Nothing could have a more detrimental effect on the operation of this country's insurance industry than uncer-

of the insurer's obligations. *See generally Mack Boring & Parts v. Meeker Sharkey Moffitt*, 930 F.2d 267, 268 (3d Cir. 1991); D. McGill & D. Grubbs, Fundamentals of Private Pensions 492-97 (6th ed. 1989).

tainty concerning the fundamental rules which are to govern the management of its general corporate assets. The federal courts are now divided on precisely this issue. The holding of the Second Circuit in this case seriously undermines the fundamental premises on which the industry has sold billions of dollars of insurance contracts to retirement plans for decades and the system of state insurance laws which have traditionally regulated its business practices. The Third Circuit, on the other hand, has correctly concluded that Congress did not intend ERISA to alter the regulation of this business or to impede the sale of traditional General Account insurance contracts to retirement plans. This Court's review of the Second Circuit's holding is urgently required to resolve the conflict which currently exists among the Circuits and which makes it impossible for insurance companies to conduct their businesses with any reasonable guidance as to their statutory and regulatory duties or reasonable predictability as to the legal consequences of their actions.

1. Unlike Traditional Trust Arrangements, General Account Contracts Do Not Give Rise to Fiduciary Relationships

Trust arrangements and General Account insurance contracts traditionally have constituted the two primary vehicles through which retirement plans have accumulated funds to pay benefits to their participants and beneficiaries.[3] Because those two vehicles are very different, they historically have been governed by fundamentally different schemes of regulation.

A plan placing funds in a trust account of a bank or other financial institution receives no undertakings or guarantees from the trustee as to the investment performance of the trust's assets or their sufficiency to satisfy the plan's obligations to pay benefits. Rather, the trustee simply obligates itself to invest the trust assets in a man-

[3] *See generally, 1992 Life Insurance Fact Book, supra* p. 1, at 54; D. McGill & D. Grubbs (6th ed.), *supra* note 2, at 487-92, 565-70.

ner consistent with the plan's objectives and to return to the plan the trust assets as increased or diminished by investment results. The plan thus retains all of the essential attributes of ownership of the trust's assets. Accordingly, under both the common law of trusts and ERISA, the relationship between a plan and trustee (or investment manager or adviser retained by the plan or trustee to manage the trust assets) has been characterized as a fiduciary relationship. This relationship requires the trustee to segregate the trust's assets from its own assets and to manage them for the exclusive benefit of the plan. *See* ERISA §§ 403(a) & 404(a)(1), 29 U.S.C. §§ 1103(a) & 1104(a)(1).

An insurance company General Account contract is a very different vehicle. Such contracts provide various guarantees through which the insurer agrees to assume risks related to the funding and distribution of plan benefits.[4] Plans that choose to purchase these contracts do so with the understanding that their payments to the insurer will become part of its general corporate assets and will not be managed solely in their interest or applied exclusively for their benefit.[5] Indeed, they generally draw comfort from the fact that the contractual rights which they have

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[4] As to the types of risks assumed by insurers, see K. Black & H. Skipper, *Life Insurance* 494 (11th ed. 1987).

[5] In the early 1960's, many states amended their insurance laws to permit the establishment of separate accounts. Through the separate account, the insurer could offer vehicles that competed with bank trust funds. The single-customer and pooled separate accounts that insurers may establish are analogous to the single-customer or pooled trust accounts established by banks. Assets held in separate accounts back contractual obligations to the specific separate account contractholder or class of contractholders. Unlike the General Account, from which only fixed benefits are paid, the separate account may back fixed or variable benefits (benefits that vary in amount with the investment results of the account). Separate account assets are generally subject to ERISA's fiduciary responsibility provisions. DOL, Definition of "plan assets"—plan investment, 29 C.F.R. § 2510.3-101(h)(1)(iii). For a description of separate accounts, see generally D. McGill & D. Grubbs (6th ed.), *supra* note 2, at 494-97.

acquired in exchange for such consideration will be supported on an unsegregated basis by a large pool of assets derived from various classes of business.

Recognizing the fundamental differences between the placement of funds in trust and the purchase of an insurance contract, the common law has historically characterized the relationship between an insurer and a General Account contractholder as a contractual rather than a fiduciary relationship.[6] Accordingly, prior to ERISA's enactment, insurers were not constrained by trust law requirements from issuing contracts whose obligations were supported by commingled assets, the management of which could not be undertaken on behalf of any particular contractholder or class of contractholders with the undivided loyalty expected of a fiduciary. Instead, the interests of employee benefit plans and other General Account contractholders have been protected by state insurance laws. These laws are designed to assure that an insurer is able to satisfy its contractual obligations to all contractholders, and that all contractholders are treated equitably and on a non-discriminatory basis.[7] Employee benefit plan con-

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[6] *Equitable Life Assur. Soc'y v. Brown*, 213 U.S. 25, 46 (1909); *Ohio State Life Ins. Co. v. Clark*, 274 F.2d 771, 778 (6th Cir.), *cert. denied*, 363 U.S. 828 (1960); *Andrews v. Equitable Life Assur. Soc'y*, 124 F.2d 788, 789 (7th Cir. 1941), *cert. denied*, 316 U.S. 682 (1942); *Rochester Radiology Assoc. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985).

[7] *See* N.Y. Ins. Law § 4239 (authorizing the superintendent of insurance to issue regulations providing for "the equitable allocation of income and expenses among lines of business and as between investment expenses and insurance expenses"); N.Y. Comp. Codes R. & Regs. tit. 11, § 91.1(a) (allocation of income and expenses of a life insurer must, among other things, "comply with Insurance Law requirements that holders of insurance policies and annuity contracts be treated equitably"); *id.* § 91.4(a).

State laws do not subject an insurance company's General Account investments to the "exclusive benefit" standard prescribed by ERISA. Rather, state insurance laws customarily specify the types of assets in which insurance companies may invest for their General Account—and impose a general requirement of prudence. *See, e.g.*, N.Y. Ins. Law

tractholders and their participants and beneficiaries are protected, as well, by the fiduciary requirements placed on a plan trustee, administrator, or other plan representative in connection with having responsibility for the purchase, monitoring and disposition of these contracts.[8]

2. ERISA Was Not Intended to Alter the Traditional Regulation of General Account Contracts

In enacting ERISA, Congress did not manifest any intention to depart from the traditional characterization of General Account insurance arrangements or to impose upon them a scheme of regulation that was incompatible with their customary operation and regulation under state insurance laws. To the contrary, ERISA includes a specific provision that excludes from the statute's fiduciary responsibility provisions the management of funds received by an insurer under "guaranteed benefit policies."[9] This

§ 1405(c). State law provides a variety of other forms of protection for purchasers of General Account contracts—including laws requiring filing and approval of the contracts themselves, state guaranty funds, and laws prescribing equitable distribution of assets in the event of insolvency.

[8] *Harris Trust & Savings Bank v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138, 1145 (2d Cir. 1992) (stating that "the holder of the contract is the entity subject to fiduciary responsibility"); *see* DOL, Letter on Fiduciary Responsibility and Plan Terminations (Mar, 13, 1986), *published in* 13 Pens. Rep. (BNA) 472 (Mar. 17, 1986), *available in* WESTLAW, 13 BPR 472, BNA-PEN database.

[9] Under ERISA, a party becomes a fiduciary to an employee benefit plan to the extent that it exercises discretionary authority or control over "the management or disposition of [plan] assets." ERISA§ 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). ERISA § 401(b)(2) provides that plan assets do not include the assets of an insurer that has issued a "guaranteed benefit policy":

> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
>
> * * * *
>
> (B) The term "guaranteed benefit policy" means an

exception is consistent with ERISA's "savings clause"—which excepts any state law which regulates the business of insurance from the application of ERISA's broad preemption provision.[10]

Shortly after ERISA's enactment, the DOL, the agency charged with that statute's enforcement, confirmed that the management of General Account assets is excluded from ERISA's fiduciary responsibility provisions. An interpretive bulletin issued by the DOL states that the consideration placed by an insurer in its General Account under a contract or policy of insurance "shall not be considered to be plan assets."[11] The DOL has reaffirmed this interpretation several times over the past 18 years—most significantly, in its 1986 final regulation relating to the definition of plan assets. 51 Fed. Reg. 41,262, 41,275 & 41,278 (Nov. 13, 1986). Since ERISA became law, the DOL has never asserted in any enforcement action or otherwise that an insurer was acting as a fiduciary in connection with the management of General Account assets or by virtue of the issuance of any form of General Account contract to an employee benefit plan.

> insurance policy or contract to the extent that such policy or contact provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

29 U.S.C. § 1101(b)(2).

[10] ERISA § 514(b)(2), 29 U.S.C. § 1144(b)(2) (stating that ERISA provision preempting state law shall not be construed to "exempt or relieve any person from any law of any State which regulates insurance, banking, or securities").

[11] DOL Interpretive Bulletin 75-2, 29 C.F.R. § 2509.75-2, states in pertinent part:

> If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets.

29 C.F.R. § 2509.75-2(b).

3. The Second Circuit Has Radically Altered the Accepted Understanding That the Management of General Account Assets Is Subject to State Insurance Regulation, Not ERISA's Fiduciary Standards

In this case, the Second Circuit has held that ERISA's general fiduciary responsibility provisions apply to an insurer's management of General Account assets by virtue of its issuance of a form of group annuity contract which was in common use at the time of ERISA's enactment and which continues in common use today. In reaching that result, the Second Circuit ignored the substantial differences between General Account contracts and those types of arrangements which traditionally have been subject to fiduciary standards of conduct. Furthermore, it misinterpreted the meaning, scope and intent of the relevant statutory provisions and administrative interpretations. The Second Circuit's position is in direct conflict with a recent decision of the Third Circuit, *Mack Boring & Parts v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991). In *Mack Boring*, the Third Circuit analyzed the same statutory text, legislative history, and administrative pronouncements as the Second Circuit. The Third Circuit determined, however, that ERISA's fiduciary responsibility provisions were incompatible with the normal operations of a General Account. The court then concluded that there was nothing in ERISA's statutory language or legislative history to evidence that Congress intended to create "so severe a disruption of insurance practices" as would ensue from the application of ERISA's fiduciary responsibility provisions to the management of General Account assets and from the creation of "dual loyalties" for insurance companies. *Id.* at 275 n.17.

Absent review by this Court, the insurance industry faces uncertainty as to the extent to which General Account assets can continue to be commingled and applied on an unsegregated basis to support ERISA related and non-ERISA related obligations to policyholders. The extent to which decisions concerning these assets can take into account the interests of non-ERISA policyholders also is unclear. While leaving the insurance industry in a significant dilemma as to how to conduct its future operations, the Second Circuit's decision invites challenges under ERISA to the myriad business and investment decisions that have been made in the past by insurers with a reasonable understanding, supported by nearly two decades of consistent DOL pronouncements, that ERISA's fiduciary responsibility provisions are inapplicable to the management of their General Accounts.

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVIEWED IN ORDER TO RESOLVE A CLEAR CONFLICT AMONG CIRCUITS ON AN ISSUE OF VITAL SIGNIFICANCE TO THE INSURANCE INDUSTRY AND ITS POLICYHOLDERS

This case presents the question of whether ERISA's general fiduciary responsibility provisions are applicable to an insurance company's management of General Account assets by virtue of its issuance of General Account contracts to retirement plans. The interests of insurance company policyholders whose contract rights are secured by General Account assets traditionally have been protected under state insurance laws, a scheme of regulation which is fundamentally incompatible with ERISA's fiduciary standards. This issue, which has spawned a clear conflict among the Circuits, is one of great significance to the insurance industry, to retirement plan participants whose benefits are funded and distributed through General Account contracts, and to all other insurance company policyholders whose rights are secured by insurance company General Accounts. The holdings of the Second and Third Circuits concern a broad category of contracts which have been sold to an enormous number of retirement plans. The differences between the Circuits cannot be reconciled on the basis of differences between the particular contracts which were reviewed in those cases.

Both this case and *Mack Boring* address contracts which are commonly referred to as "unallocated General Account contracts." Both before and after ERISA's enactment, unallocated contracts have been the most popular form of insurance company contract sold to retirement plans.[12] The Council estimates that insurance companies hold over $315 billion of funds in their General Accounts under unallocated contracts.[13]

Amounts contributed pursuant to an unallocated contract are not necessarily applied immediately to the purchase of guaranteed benefits for participants.[14] Rather, amounts contributed by the contractholder are credited to a bookkeeping account which is charged with the cost of providing guaranteed benefits to plan participants as they become eligible to receive them. The insurer typically provides guarantees with respect to the preservation of the principal balance of the bookkeeping account as well as the rates at which the funds in such bookkeeping account can be applied to the purchase of guaranteed benefits for participants. Most of these contracts, including those at issue in this case and in *Mack Boring*, provide that the interest to be credited to these accounts will be based in whole or in part on the insurer's investment results.[15]

As John Hancock Mutual Life Insurance Company ("Hancock") demonstrates in its Petition, and as the Second Circuit acknowledged, the Second and Third Circuits have adopted irreconcilable standards for determining whether and to what extent the consideration received by insurers under unallocated contracts and placed in their commingled General Accounts are "plan assets" whose management becomes subject to ERISA's general fiduciary responsibility provisions. Hancock's Petition for a Writ of Certiorari 12-13; *Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co.*, 970 F.2d 1138, 1144 (2d Cir. 1992). The Third Circuit concluded that funds held under an unallocated General Account contract are excluded from the reach of ERISA so long as such funds may be applied immediately or in the future to the payment of guaranteed benefits to plan participants and beneficiaries, a condition which is invariably satisfied as to the entirety of unallocated General Account contract funds. *Mack Boring*, 930 F.2d at 273-75. The Second Circuit rejected such holding and ascribed "plan asset" status to a portion of these same type of unallocated funds. *Harris Trust*, 970 F.2d at 1143-44. The resultant conflict calls into question the status under ERISA of hundreds of billions of dollars of unallocated General Account contract funds, leaving the insurance industry in an untenable position in determining what rules are to apply to the management and administration of its General Account assets.[16]

[12] D. McGill & D. Grubbs (6th ed.), *supra* note 2, at 551. For a recent description of unallocated contracts, see generally *id.* at 550-64.

[13] *1992 Life Insurance Fact Book*, *supra* p. 1, at 58.

[14] D. McGill & D. Grubbs (6th ed.), *supra* note 2, at 552. In contrast, amounts contributed pursuant to "allocated" General Account contracts are applied immediately to the purchase of guaranteed benefits for participants, even though benefits are not yet payable under the plan. *See id.* at 526.

[15] *Mack Boring*, 930 F.2d at 268-69; *see* D. McGill & D. Grubbs (6th ed.), *supra* note 2, at 552.

[16] The fact that the Second Circuit's decision is ostensibly limited to certain funds (referred to in the decision as "free funds") under the Hancock contract does not diminish the significance of this conflict. A large portion of the funds held by insurers under unallocated contracts would be regarded as "free funds" under the Second Circuit's reasoning. More significantly, the term "free funds" does not refer to separately managed and identifiable General Account assets. Such "funds" exist only as bookkeeping entries which can change as frequently as every day. Inasmuch as all of an insurer's General Account assets secure all General Account obligations on an unsegregated basis, the Second Circuit's holding may affect all such assets and all insurance company practices concerning the management and administration of such assets.

II. BY CREATING SUBSTANTIAL UNCERTAINTY OVER THE SCHEME OF REGULATION TO BE APPLIED TO INSURANCE COMPANY GENERAL ACCOUNTS, THE SECOND CIRCUIT'S DECISION AND RESULTANT CONFLICT AMONG THE CIRCUITS WILL HAVE A SUBSTANTIAL ADVERSE IMPACT ON THE EFFECTIVE OPERATION OF INSURANCE BUSINESSES AND MARKETS

The decision of the Second Circuit in this case and the resultant conflict among Circuits presents insurance companies with three serious and unresolvable dilemmas, each of which materially affects their ability to conduct their business in a fashion which is consistent with their customary and necessary practices, the state laws which govern such practices, and the expectations of their policyholders and other constituents. As a result, there is a compelling need for this Court to grant Hancock's Petition and resolve the conflict among the Circuits.

First, the Second Circuit's ruling subjects insurers to a scheme of regulation which the Third Circuit found to be incompatible with the nature of an insurer's state law obligations to General Account contractholders and with the regulation of General Accounts under state insurance laws. *Mack Boring*, 930 F.2d at 275 n.17; *see also Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co.*, 722 F. Supp. 998, 1020 (S.D.N.Y. 1989), *rev'd in part and aff'd in part*, 970 F.2d 1138 (2d Cir. 1992). ERISA requires that a fiduciary manage plan assets "solely in the interest of" plan participants and beneficiaries and "for the exclusive purpose of" paying benefits to them. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). An insurance company General Account, however, whose assets support all general business and policyholder obligations on a commingled and unsegregated basis, cannot be managed single-mindedly in the interests of any particular policyholder or class of policyholders. To so act would violate state insurance law which requires an insurer to deal fairly and equitably with all policyholders as a group.

The Second Circuit does not acknowledge this fundamental conflict, let alone offer any guidance as to how to resolve it.[17] As a result, no prudent insurer can avoid considering whether it can continue to offer products which historically have funded a large percentage of this nation's private pensions. Even more significantly, with respect to the hundreds of billions of dollars which already are held in insurance company General Accounts under contracts of the type addressed by this case, insurers are now left to consider how to manage these accounts in conformity with conflicting federal fiduciary and state insurance regulatory standards and objectives. In this regard, the segregation of assets held in the General Account to support business which might be subject to ERISA's fiduciary standards, if it were attempted, is neither a solution which would resolve this problem, nor one which would be compatible with the expectations or interests of an insurer's ERISA covered or non-ERISA covered contractholders.[18]

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[17] Ironically, in failing to acknowledge this conflict with state law duties, the Second Circuit ignored its prior holding in *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980). There, the court found it inappropriate to impose fiduciary status on the New York Superintendent of Insurance in its capacity as rehabilitator of a financially troubled insurer. The court concluded that:

> Lewis is not the type of official whom Congress had in mind as an ERISA fiduciary. . . . Lewis's statutory obligation is to consider fairly the claims of all creditors of the bankrupt company; as a fiduciary, he could not help being put in a position of divided loyalty from the outset.

635 F.2d at 968.

[18] Any attempt by an insurer to set aside a portion of its General Account assets for the exclusive benefit of particular policyholders and to manage such assets solely in their interests is both infeasible and contrary to the expectations of General Account contractholders for several reasons. First, state insurance laws require that all General Account assets be available to support all General Account liabilities. Therefore, it would be legally impossible to manage any assets for the exclusive benefit of only some of the policyholders whose contractual rights are supported by such assets. Second, even if such a segregation of assets were legally possible, the very process of dividing up such

Second, the Second Circuit's decision leaves insurance companies with large exposure to litigation for the manner in which they have conducted their business in the past. Such exposure is both unexpected and unwarranted. The relationship between insurers and their General Account policyholders and the management of insurance company General Accounts have traditionally been subject to state insurance regulation. Nothing in the text or legislative history of ERISA evidences a congressional intent to disrupt that scheme through the application of ERISA's fiduciary standards. *Mack Boring*, 930 F.2d at 275 n.17 (finding no evidence that "Congress had intended so severe a disruption of insurance practices, practices that had been in existence for almost three decades before the enactment of ERISA"). As preeminent pension scholars have stated, the rationale for the exemption of General Account assets from ERISA's fiduciary responsibility provisions, "apart from its inherent logic, is that the general account operation, including its investment activities, are adequately supervised by state regulatory authorities." D. McGill & D. Grubbs (6th ed.), *supra* note 2, at 439. The DOL has consistently and unambiguously stated that General Account assets are not plan assets subject to regulation under ERISA.[19] As a consequence, insurers reasonably have not considered themselves to be fiduciaries in managing their General Account assets.[20] Indeed, to have acted otherwise

assets would be subject to conflicting ERISA and state regulatory standards. Finally, such a segregation of assets would deprive General Account policyholders of all of the benefits of having their assets supported by a large pool of assets derived from diversified risks, a result contrary to their expectations in purchasing their contracts and to the terms of their contracts.

[19] *See infra* pp. 19-20 & note 24.

[20] In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), the Seventh Circuit, on appeal by the plaintiff from dismissal of the complaint, reached the same result as the Second Circuit in this case. However, the industry did not rely on *Peoria Union* (or its progeny) because of its weak precedential value. In *Peoria Union*, after the defendant insurance company moved for rehearing, the Council submitted an *amicus curiae*

would have been contrary to the reasonable expectations of their contractholders and their obligations under state insurance laws. The Second Circuit's holding, however, would permit dissatisfied customers to seek damages or reformation of their contracts on the grounds that insurers failed to manage General Account assets exclusively for their benefit or solely in their interests. Moreover, such litigation would be judged pursuant to fiduciary rules, under which the insurer's conduct would be assessed only in terms of the interests of the plaintiff contractholder without regard for the interests of all other insurance company contractholders and constituents whose interests may be vitally affected by such conduct.

Finally, one of ERISA's fundamental purposes is to assure that the administration and funding of employee ben-

brief that set forth—for the very first time in that case—ERISA's legislative history, DOL interpretation, and the policy implications of applying ERISA to General Account assets. In denying the petition for rehearing, the Seventh Circuit expressly acknowledged that it had not considered these matters and noted that:

> In view of the fact that the panel decision merely reverses the dismissal of the complaint under Fed. R. Civ. P. 12(6)(b) [sic], the case is at an early stage and the appellee will have ample opportunity to present its arguments to the district court consistently with the flexible contours of the doctrine of law of the case.

Peoria Union, 698 F.2d at 328. For this reason, the soundness and precedential value of the holding in *Peoria Union* have been questioned by many courts, including the trial court in the present case, a recent decision in the Seventh Circuit, and the Third Circuit. *See Harris Trust & Savings Bank v. John Hancock Mut. Life Ins. Co.*, 722 F. Supp. 998, 1015-16 n.25 (S.D.N.Y. 1989), *aff'd in part and rev'd in part*, 970 F.2d 1138 (2d Cir. 1992); *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1189 (N.D. Ill. 1989) (noting that *Peoria Union* was decided before the DOL "had fully developed the views that were eventually crystallized" in the plan asset regulations), *aff'd*, 941 F.2d 561 (7th Cir. 1991); *Mack Boring*, 930 F.2d at 271 n.11 ("Because the *Peoria Union* court did not give full consideration to those authorities and contentions not drawn to its attention until the petition for rehearing, its decision cannot be read as a rejection of those authorities and contentions. Indeed, had such arguments been made before the court of appeals prior to its decision on the merits, the result it reached might well have been different.").

efit plans would be subject to uniform national standards. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 1084 (1981); *see also Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1498 (9th Cir. 1984). Such a purpose is broadly and materially undermined to the extent that the basic scheme of regulation to be applied to the relation between insurance companies and employee benefit plans who purchase General Account contracts from such companies remains a matter of substantial conflict among the federal courts. The importance of this issue from the perspective of both the industry and of employee benefit plans and other policyholders dictates that its outcome should not be determined on the basis of forum shopping or the happenstance of the particular jurisdictions in which a defendant is amenable to suit.

III. THE SECOND CIRCUIT MISCONSTRUED THE STATUTE AND THE DEPARTMENT OF LABOR'S POSITION

Immediately following ERISA's effective date in 1975, the DOL clarified for the pension industry that the "guaranteed benefit policy" safe harbor of section 401(b)(2), 29 U.S.C. § 1101(b)(2), evidenced congressional intent that General Account assets are not to be treated as "plan assets" for purposes of ERISA's fiduciary responsibility rules. In *Mack Boring*, the Third Circuit considered the "guaranteed benefit policy" provision in its historical context and came to the same conclusion. That interpretation is entirely consistent with the statute's language and legislative history.

Section 401(b) provides two safe harbors from the application of plan asset status. Subsection (b)(1) provides that, when a plan purchases the securities of an investment company (mutual fund), the underlying assets of the investment company are *not* plan assets. Similarly, subsection (b)(2) provides that, when a plan invests in a "guaranteed benefit policy," the underlying assets of the insurance company are *not* plan assets. More specifically,

section 401(b)(2) defines "guaranteed benefit policy" as an insurance policy or contract: 1) "to the extent," 2) it "provides for" 3) "benefits," 4) "the amount of which is guaranteed," 5) including "surplus in a separate account," 6) but excluding "any other portion of a separate account."

The Second Circuit ignored or misconstrued several of these phrases. It concluded that if any portion of the funds held under a General Account contract are not immediately necessary to support the costs of paying guaranteed benefits to participants and no guarantees of investment returns on such funds are furnished to the contractholder, then "to [that] extent" the contract is not a guaranteed benefit policy and, consequently, such funds are plan assets. Such a reading of the guaranteed benefit policy exception ignores the phrase "provide for" and mistakenly assumes that the term "benefits" refers to any type of *payment* under the contract, including the crediting of interest to the employer or other plan sponsor. *Harris Trust*, 970 F.2d at 1143.[21]

[21] Another ground for questioning the Second Circuit's decision is that it apparently concluded that the "guaranteed benefit policy" provision was an "exclusive" safe harbor, so that any insurance company assets not falling within the definition constitute plan assets. By its express terms, however, § 401(b) defines only two limited circumstances in which assets are *not* plan assets. In no way does it purport to impose plan asset status in all other circumstances. The non-exclusivity of § 401(b) is evidenced in Congress's unbridled mandate in 1985 for the DOL to define plan assets in a comprehensive regulation. Pub. L. No. 99-272, § 11018(d), 1986 U.S.C.C.A.N. (100 Stat.) 277-80 (directing the DOL to "adopt final regulations defining 'plan assets' by December 31, 1986"). In its 1986 regulation, the DOL concluded that plan asset status would *not* apply to the assets of *any* entity treated as an "operating company." 29 C.F.R. § 2510.3-101(a)(2)(i) (1992). An operating company is defined to include any "entity that is *primarily engaged* . . . in the production or sale of a service other than the investment of capital. *Id.* at § 2510.3-101(c) (emphasis added). A General Account is the operating account of an insurance company, an entity primarily engaged in the business of assuming risks through the sale of insurance products. The Second Circuit, however, failed to consider whether the operation of insurers' General Accounts fell within this regulatory exemption for plan asset status.

The Third Circuit, on the other hand, properly construed and considered *all* key phrases of section 401(b)(2) in concluding that a General Account contract is a "guaranteed benefit policy" in its entirety if all General Account contract funds can be applied immediately or in the future to provide benefits to plan participants which are guaranteed by the insurer. In particular, it recognized that General Account assets "provide for" guaranteed benefits even when such benefits are not immediately payable.[22] It found that ERISA uses the term "benefits" to mean solely payments to participants and beneficiaries, not to the employer or other plan sponsor. 930 F.2d at 273 (footnote omitted).[23] The Third Circuit noted that the purpose of the phrase excluding separate accounts (other than surplus) was to close a "very large loophole" so that the separate

[22] The Third Circuit in *Mack Boring* recognized that the amount credited to the contract's accumulation account did indeed "provide[] for" guaranteed benefits:

> [The] contract clearly "makes, procures or furnishes for the future use" of the plan participants a fixed amount of benefits. Section 401(b)(2)(B) does not, on its face, require that the benefits contracted for be delivered immediately, and we will not read into the statute such a requirement.

Mack Boring, 930 F.2d at 273. The Second Circuit recognized that the so-called "free funds" held under the contract could be used to provide future guaranteed benefits to participants. Ignoring the "provides for" phrase, however, the Second Circuit found it significant that the contract "does not [provide guarantees] *at all times* with respect to all the benefits derived from the . . . free funds." *Harris Trust*, 970 F.2d at 1143.

[23] The Second Circuit, in contrast, concluded that "benefit" for purposes of § 401(b)(2) encompassed payments and obligations to plan sponsors, in concluding that the so-called "non-guaranteed portion [of the contract] is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides." *Harris Trust*, 970 F.2d at 1143. There is, however, no evidence that Congress intended "benefit" to have one meaning for one provision of ERISA and a different meaning for all others. *See S & M Inv. Co. v. Tahoe Regional Planning Agency*, 911 F.2d 324, 328 (9th Cir. 1990) ("When the same [undefined] word or phrase is used in different parts of a statute, we presume that the word or phrase has the same meaning throughout."), *cert. denied*, 111 S. Ct. 963 (1991).

account assets underlying a fixed-benefit contract would not be excluded from plan asset status. *Mack Boring*, 930 F.2d at 274. In this context, the Third Circuit correctly concluded that the phrase "to the extent" distinguished between the General Account and separate account portions of a single contract. The Second Circuit failed to make any attempt to reconcile these disparate phrases.

Because ERISA lacks a comprehensive definition of plan assets, the pension industry, immediately after the statute's enactment in 1974, expressed its concern about the potential reach of ERISA's fiduciary provisions to its ongoing operations. To allay these concerns, the DOL stepped in and, in February 1975, issued its Interpretive Bulletin 75-2 ("IB 75-2"), a broad pronouncement regarding the types of assets, including General Account assets, that do not constitute plan assets. *See* 40 Fed. Reg. 31,598 (July 28, 1975, issued Feb. 6, 1975) (currently codified at 29 C.F.R. § 2509.75-2). For example, although section 401(b)(1) speaks only of investment company securities, the DOL stated that a plan's investment in the assets of other entities also would not cause the entities' underlying assets to be deemed plan assets. 29 C.F.R. § 2509.75-2(a). And, as to General Account assets, the DOL clearly stated that General Account assets were not to be deemed plan assets. 29 C.F.R. § 2509.75-2(b).

The Second and Third Circuits are in clear conflict as to the intent of IB 75-2. The Second Circuit erroneously concluded that IB 75-2 applies only for purposes of determining the application of the prohibited transaction rules of sections 406 through 408 of ERISA. *Harris Trust*, 970 F.2d at 1145. The Third Circuit, in contrast, found that the DOL intended IB 75-2 to apply for all purposes of ERISA. *Mack Boring*, 930 F.2d at 276. The correctness of the Third Circuit's position is made indisputably clear by the DOL's affirmance of its position on General Account assets in its final regulation relating to the definition of plan assets issued in 1986. 51 Fed. Reg. 41,262, 41,275,

41,278 (Nov. 13, 1986).[24] The Third Circuit recognized that, in "affirm[ing] the viability of IB 75-2(b) in the context of a plan assets regulation, we must assume that the regulation speaks authoritatively with respect to plan asset identification." *Mack Boring*, 930 F.2d at 276. There simply is no language in ERISA to suggest that assets can be "plan assets" for purposes of the general fiduciary responsibility provisions but not for purposes of the prohibited transaction provisions.[25]

In summary, the Second Circuit has relied on a misreading of one phrase ("to the extent that") of the "guaranteed benefit policy" exception and an indefensibly narrow construction of the intended scope of a definitive agency interpretation of ERISA, to radically alter the long-accepted understanding that the management of General Account assets is subject to state regulation, not ERISA's fiduciary standards.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

[24] *See also* 44 Fed. Reg. 50,363, 50,364 n.4 (Aug. 28, 1979) (citing IB 75-2, the DOL stated that it "has previously interpreted this provision [section 401(b)(2)] to mean, generally that assets held in an insurer's general account to support benefits under a contract purchased by a plan are not plan assets, but that assets held for the same purpose in the insurer's separate account are plan assets.").

[25] ERISA § 408(a), 29 U.S.C. § 1108(a), contains an administrative procedure for the DOL to grant exemptions from the prohibited transaction provisions. An "interpretive bulletin," however, is not an exemption. Rather, IB 75-2 sets forth the DOL's position that General Account assets are not plan assets.

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APPENDIX

APPENDIX

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), provides:

Definitions

For purposes of this subchapter:

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibilities to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA §401(b), 29 U.S.C. §1101(b), provides:

Coverage

* * *

(b) For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely be reason of the issuance of

such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA §403, 29 U.S.C. §1103, provides in pertinent part:

Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides:

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

ERISA § 408(a), 29 U.S.C. § 1108(a), provides:

Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or

class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interest of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) provides:

Other laws

* * *

(b) Construction and application

(2)(a) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 C.F.R. § 2509.75-2(b) provides:

(b) *Contracts or policies of insurance.* If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

29 C.F.R. § 2510.3-101 provides in pertinent part:

Definition of "plan assets"—plan investments.

(a) In general.

* * *

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940 its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that—

(i) The entity is an operating company,

* * *

(c) Operating company. (1) An "operating company" is an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, it the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is not described in the preceding sentence, but which is a "venture capital operating company" described in paragraph (d)

or a "real estate operating company" described in paragraph (e).

* * *

(h) Specific rules relating to plan investments. Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

* * *

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account.

N.Y. Ins. Law § 1405(c) provides:

Investments

(c) In addition to other requirements of law (statutory or otherwise) that affect the standard of care of directors and officers of corporations, in making investments under this section, directors and officers shall perform their duties in good faith and with that degree of care that an ordinarily prudent individual in a like position would use under similar circumstances. In the case of investments made under paragraphs two and six of subsection (a) of this section and investments that are substantially of the same types as those eligible for investment under such paragraphs, but are made under paragraph seven of such subsection, the institution that determines the eligibility of any such investment shall be a solvent institution whose obligations, if any, are not in default as to principal or interest, unless such investment is necessary to protect an investment theretofore made in the securities of such institution.

N.Y. Ins. Law § 4239 provides:

Allocation and reporting of income and expenses of life insurers

(a) In order to enable the superintendent to determine compliance with this chapter, he may issue reasonable regulations prescribing standards for the equitable allocation of income and expenses as among lines of business and as between investment expenses and insurance expenses. No such regulation or amendment thereto shall be promulgated except upon notice to all insurers affected thereby, and after hearing. Such regulation or amendment shall not preclude the use of other reasonable and equitable standards previously approved by the superintendent. He may also promulgate regulations defining the items of income and expenses to be reported in each line of the annual statement. Any regulation or amendment thereto shall be promulgated at least six months before the beginning of the calendar year in which the same shall take effect.

(b) The restrictions in subsection (a) hereof as to notice, hearing, and effective period shall not apply to such regulations or amendments as may be approved by the superintendent for calendar years as to which similar regulations or amendments have been adopted by the National Association of Insurance Commissioners.

(c) If the superintendent finds, after notice and hearing, that any such insurer has failed to comply with the requirements of this section, he may order such insurer to change its methods of reporting or to modify its basis of allocation so as to produce reasonable and equitable results.

N.Y. Comp. Codes R. & Regs. tit. 11 § 91.1(a) provides:

Purpose

(a) Equitable allocation of income and expenses of a life insurer is the responsibility of its management. Its exercise of such responsibility, while shaped by appropriate consideration of such factors as size, mode of operation and classes of business written by the insurer, must accord with sound accounting practice and comply with Insurance Law requirements that holders of insurance policies and annuity contracts be treated equitably (§§ 204, 209, 216, 221, 223 and 226) and that insurance policies and annuity contracts be self-supporting on reasonable assumptions as to mortality, morbidity, interest and expense (§§ 213 and 221).

N.Y. Comp. Codes R. & Regs. tit. 11 § 91.4(a) provides:

Standards and rules for allocation of income (receipts) and expenses

(a) General instructions. (1) It is the responsibility of each life insurer to use only such methods of allocation as will produce a suitable and equitable distribution of income and expenses by lines of business. Unless impractical or unfeasible, an insurer may use only such methods of allocation in its distribution of income and expenses within annual statement lines of business as are compatible with the methods it uses for distribution between annual statement lines of business.

(2) Each life insurer shall maintain records with sufficient detail to show fully:

(i) the system actually used for allocation of income and expenses;

(ii) the actual bases of allocation;

(iii) the actual monetary distribution of the respective items of income, salaries, wages, expenses, and taxes to:

(a) units of activity or functions, if any distribution is made on such basis,

(b) fund accounts, if any distribution is made on the basis thereof, reflecting separately, for each fund, premiums or considerations, investment income, capital gains and losses, benefit payments, expenses, and provision for reserves,

(c) annual statement lines of business,

(d) companies, and

(e) a recapitulation and reconciliation of items (a), (b), (c) and (d) with the insurer's books of account and annual statement.

(3) Such records shall be classified and indexed in such form as to permit ready identification between the item allocated and the basis upon which it was allocated, and shall be maintained in such a manner as to be readily accessible for examination. These records shall bear a date and shall identify the person responsible for the preparation thereof.

(4) Bases of allocation shall be reviewed periodically to ascertain their suitability for continued use.

(5) Allocations of income and expenses between companies shall be treated in the same manner as if made for major annual statement lines of business.

(4)

No. 92-1074

In The

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October Term, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

[redacted] BRIEF OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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CONSENT TO FILING

Both Petitioner and Respondent have consented to the filing of this brief of *Amicus Curiae*.

INTEREST OF AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is a non-profit, unincorporated association whose members consist of the principal insurance regulatory officials of the 50 states, the District of Columbia, territories and insular possessions of the United States. The NAIC is interested in filing this brief in furtherance of its objectives to serve the public by assisting the several state insurance regulatory officials in improving state regulation of the business of insurance and promoting fair and equitable treatment of insurance policyholders and claimants.

The Executive Committee of the NAIC, which consists of sixteen insurance commissioners from all regions of the country, voted to file a brief of *Amicus Curiae* in this action, on behalf of the full NAIC membership. The interest of the NAIC in filing this brief is based on the commissioners' collective interest in soliciting a decision by the Supreme Court of the United States, to reconcile the conflicting opinions of two different United States courts of appeals.

One such opinion was rendered by the United States Court of Appeals for the Second Circuit in *Harris Trust and Savings Bank v. John Hancock Mutual Life Insurance Company*, 970 F.2d 1138 (2d Cir. 1992). In this case, the

Second Circuit held that John Hancock had a fiduciary duty, pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq. (1985) (amended 1992), with regard to the administration of funds allocated to the payment of nonguaranteed benefits maintained in the insurers' general account. *Harris Trust*, 970 F.2d 1138 at 1148.

This decision conflicts with an earlier decision by the United States Court of Appeals for the Third Circuit, rendered in a case with similar facts: *Mack Boring and Parts v. Meeker Sharkey Moffitt, Actuarial Consultants of New Jersey*, 930 F.2d 267 (3rd Cir. 1991). In this case the Third Circuit held that an ERISA fiduciary duty did not apply to administration of certain funds maintained for the payment of nonguaranteed benefits. *Mack Boring*, 930 F.2d 267 at 277.

The inconsistent application of ERISA fiduciary standards to insurers is of great concern to insurance regulators charged with regulating such insurers. The insurance commissioners are interested in encouraging the Court to resolve the conflicting application of ERISA standards. The NAIC respectfully seeks direction from the Court so that inconsistent and inappropriate regulation is avoided and the legal rights of insurance consumers are clarified.

SUMMARY OF THE ARGUMENT

The insurance commissioners in the various states have been charged with regulating the business of insurance and all persons engaged therein. McCarran-Ferguson Act, 15 U.S.C. Section 1012 (1945). They are, therefore, highly

interested in encouraging the Court's resolution of conflicting circuit court decisions regarding whether or not ERISA fiduciary standards apply to certain funds maintained by an insurer. As explained in more detail later in this brief, the Second Circuit has held that fiduciary standards are applicable, while the Third Circuit has held that they are not applicable.

In this case, resolution of the conflicting circuit court decisions would provide valuable guidance to insurance commissioners charged with regulating insurance companies. Additionally, insurance consumers would receive some sense of predictability through the Court's clarification of their legal rights.

ARGUMENT

I. RECENT DECISIONS OF THE SECOND AND THIRD CIRCUITS CLEARLY CONFLICT WITH EACH OTHER

As briefly mentioned earlier, recent decisions of the Second and Third Circuits clearly conflict with each other.[1] The United States Court of Appeals for the Second Circuit held in *Harris Trust* that John Hancock had a fiduciary

[1] Pursuant to Rule 10 of the Rules of the Supreme Court, the Court has discretion to review a case on Writ of Certiorari when there are special and important reasons therefor. Rule 10 indicates that conflicting circuit court decisions on the same matter may be considered by the Court as a reason for granting a Writ of Certiorari. James WM. Moore, *Moore's Federal Practice* 907 (1992).

duty, pursuant to ERISA, with regard to the administration of excess funds allocated to the payment of non-guaranteed benefits maintained in the insurer's general account. *Harris Trust*, 970 F.2d 1138 at 1148.

Pursuant to a Group Annuity Contract, premiums paid by Sperry, and later by Harris Trust, were deposited into Hancock's general account of corporate funds. An insurer's general account includes all assets and liabilities of its insurance and ancillary operations, except those assets and liabilities specifically allocated to separate accounts. From this account, the insurer pays operating expenses, general account policyholders, obligations to creditors, and dividends to policyholders. General account assets are often invested by insurers. *Mack Boring*, 930 F.2d 267 at 268.

The premiums paid by Sperry were for individual deferred annuities from Hancock for the Sperry retirement plan. Harris Trust, the successor trustee of the retirement plan, claimed that John Hancock violated its fiduciary duties under an ERISA provision which provides that one is "a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management . . . or disposition of its assets. . . . " ERISA, 29 U.S.C. 1002(21)(A).

An insurance company holding a guaranteed benefit policy in its general account, however, is exempt from such fiduciary duties. *Harris Trust*, 970 F.2d 1138 at 1142, citing ERISA, 29 U.S.C. Section 1101(b)(2). While the *Harris Trust* court conceded that Hancock had no fiduciary duties with regard to guaranteed benefits administered for Harris Trust, the court questioned whether other

funds, which are not guaranteed but are part of the overall Hancock/Harris Trust contract, are subject to ERISA fiduciary standards. Ultimately the court determined that fiduciary standards are applicable to such funds "to the extent that the insurer engages in the discretionary management of assets." *Harris Trust*, 970 F.2d 1138 at 1144.

In contrast, the United States Court of Appeals for the Third Circuit held in *Mack Boring* that the statutory exemption from fiduciary responsibilities extended "to the entirety of any contract under which any benefits are guaranteed, so that the exemption would apply regardless of the apportionment between the guaranteed component and the investment component of the contract." *Harris Trust*, 970 F.2d 1138 at 1144, summarizing *Mack Boring*, 930 F.2d 267.

II. CONGRESS DELEGATED TO THE STATES THE RESPONSIBILITY TO REGULATE INSURANCE

In 1945, Congress enacted the McCarran-Ferguson Act which dictates that the business of insurance and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business. 15 U.S.C. Section 1012 (1945). The official Declaration of Policy to this Act states that, "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest." McCarran-Ferguson Act, 15 U.S.C. Section 1011. The plain meaning of this statute evidences the delegation of insurance regulatory duties to the states.

In addition, most state insurance codes charge the respective state insurance commissioners with all rights and duties expressed or reasonably implied by the state laws, related to regulation of the business of insurance. *See, e.g.*, N.Y. Ins. Law Section 201 (McKinney 1987). Detailed state insurance statutes and regulations govern insurance company operations and maintenance of general accounts. *See, e.g.*, N.Y. INS. Law Sections 1402, 1403, 1409 (McKinney 1985).[2]

III. PUBLIC POLICY DICTATES THAT THE COURT RESOLVE THIS CONFLICT FOR THE ULTIMATE BENEFIT OF THE CONSUMER

Resolution by this Court of the conflicting decisions described herein would provide guidance to insurance companies for the future management of certain employee benefit funds. Direction from this Court would also aid insurance commissioners in their regulation of insurance company fund management. Additionally, insurance consumers would have some sense of predictability in knowing whether or not their benefits are ultimately subject to ERISA fiduciary standards.

---

[2] Additionally, the NAIC accreditation program specifically requires state laws to regulate investments, liabilities, and reserves of insurers. NAIC, *NAIC Accreditation Reference Manual* (1992). States that meet these and other specific regulatory standards are eligible for accreditation by the NAIC.

CONCLUSION

The National Association of Insurance Commissioners strongly urges the Court to issue a Writ of Certiorari to ultimately reconcile conflicting circuit court decisions regarding the applicability of fiduciary standards to certain funds held by insurers.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE ATTORNEY GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* THE ATTORNEY GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of New York respectfully submits this brief on behalf of the Superintendent of Insurance of the State of New York as *amicus curiae* in support of the Petition of the John Hancock Mutual Life Insurance Company ("John Hancock") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Superintendent of Insurance of the State of New York (the "Superintendent"), as head of the Department of Insurance (the "Department"), regulates the business of insurance in the State of New York. The Superintendent is responsible for monitoring and regulating insurers that do business in New York, such as petitioner John Hancock, and for regulating the content and sale of the insurance products that those insurers offer, such as the group annuity contract that is the subject of this lawsuit ("GAC 50").[1] This task is enormous and complex. In 1992 there were 87 life insurance companies domiciled in New York and another 142 licensed to do business in the State. In 1991, these insurers received premiums in New York for annuities alone totaling $4.059 billion. They received total premiums of $30.616 billion. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book*, at 74 (1992). Nationwide, as of December 1991, life insurance companies under contract with retirement plans held approximately $565 billion out of a total of $746 billion in reserves under general account contracts such as GAC 50. *Id.* at 58.

The Superintendent's foremost duty is the protection of the insuring public through enforcement of New York's comprehensive legislation governing the business of insurance in New York. This legislation both ensures the financial stability of insurers doing business in New York and protects the public by strictly prohibiting unfair discriminatory treatment of policyholders and contractholders. As set forth below, the Superintendent has a significant interest in

1. John Hancock is licensed as an insurer in the State of New York. GAC 50 was issued in New York and was reviewed and approved by the Department. The contract expressly states that it is governed in all respects by New York law.

this litigation for three reasons: first, the decision of the Second Circuit, which imposes the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Sections 1001-1426 ("ERISA"), on an insurer's management and administration of its general corporate assets, will interfere with the nondiscriminatory treatment of policyholders and contractholders required by State law; second, the decision will interfere with the State's ability to ensure the financial stability of insurance companies operating in the State; and third, application of the decision to contracts and arrangements that have been in effect for years will severely impair the administration of the insurance laws by insurance regulators.

SUMMARY OF ARGUMENT

Premiums paid to an insurance company under a group annuity contract such as GAC 50, unless allocated to a separate account, become part of the insurer's general corporate assets, commonly known as the insurer's "general account."[2] General account assets are not segregated for the benefit of particular contractholders. In monitoring the solvency of an insurance company, the Superintendent and the Department do not match specific liabilities with specific assets, but compare total liabilities with the general account's aggregate assets.

The Second Circuit's decision would disrupt the Department's regulation of the insurance industry by requiring insurers to manage certain general account assets "solely in the interest of the [plan's]

2. An insurance company uses its general account to pay its operating expenses (*e.g.*, salaries, rent and taxes), obligations to general account contractholders, obligations to creditors, and dividends to contractholders and policyholders.

participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ." ERISA § 404(a)(1) (29 U.S.C. § 1104(a)(1)). By compelling insurers to give general account funds that are deemed to be "plan assets" preferential treatment in favor of ERISA contractholders, the Second Circuit in effect requires unfair discrimination against other contractholders in violation of State law. Moreover, because the decision apparently accords "plan assets" a status separate and apart from other general account assets, it is now unclear whether these funds may be used to offset an insurer's general account liabilities, or indeed whether they are assets of the insurer at all. The decision thus interferes with the Superintendent's ability, under long-established, statutorily mandated accounting procedures, to monitor and ensure the financial well-being of insurance companies.

Application of the decision to existing insurance contracts and practices would wreak havoc on the regulation of the insurance industry. Because of this momentous impact on the fair and equitable regulation of insurance, the Superintendent urges the Court to grant certiorari.

ARGUMENT

CERTIORARI IS APPROPRIATE BECAUSE THE SECOND CIRCUIT'S DECISION IMPERMISSIBLY INFRINGES UPON STATE REGULATION OF THE INSURANCE INDUSTRY

As this Court has recognized as recently as 1990, the regulation of insurance is an area of traditional state regulation that Congress did not intend to preempt. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410 (1990). Congress itself made this intention plain in the McCarran-Ferguson Act, 15 U.S.C. Sections 1011-1015, which provides that the "business of insurance, and every person engaged

therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). Indeed, the savings clause of ERISA itself exempts State insurance law from ERISA preemption: "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA § 514(b)(2)(A) (29 U.S.C. § 1144(b)(2)(A)). *See generally* 111 S. Ct. at 409-10. Because the Second Circuit's decision substitutes the fiduciary requirements of ERISA for various state regulatory provisions regarding the allocation, management, and administration of an insurer's general account assets, it should be reviewed and reversed.

A. The Second Circuit's Decision Requires Insurers To Discriminate Against The Holders Of Contracts Not Subject To ERISA In Violation Of State Law

Generally, insurance is the equitable spreading of risk among a large number of policyholders or contractholders backed by the pooled assets of the insurer's general account. Those pooled assets are available to satisfy claims made under each of the policies or contracts. While New York pursues its goal of equitable treatment of policyholders through a number of statutory provisions,[3] the Second Circuit's decision would frustrate the effectiveness of those provisions.

3. *See, e.g., Health Ins. Ass'n v. Corcoran*, 154 A.D.2d 61, 68, 551 N.Y.S.2d 615, 618 (3d Dept. 1990) ("'The function of [the Department of Insurance] is to ensure equity both to policyholder and company, not only in rates but in the extremely important realm of giving the public proper coverage in return for premium payments' . . . .") (quoting *Public Serv. Mut. Ins. Co. v. Levy*, 87 Misc. 2d 924, 926, 387 N.Y.S.2d 962, 964 (Sup. Ct. N.Y. Co. 1976), *aff'd*, 57 A.D.2d 794, 395 N.Y.S.2d 1 (1st Dept. 1977).

Section 4224(a)(1) of the Insurance Law, for example, states:

> (a) No life insurance company doing business in this state and no savings and insurance bank shall:
>
> (1) *make or permit any unfair discrimination between individuals of the same class* and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, *or in any of the terms and conditions thereof* . . . .

N.Y. Ins. Law § 4224(a)(1) (emphasis added). Similarly, Article 74 of the Insurance Law, which sets forth procedures for the rehabilitation and liquidation of domestic insurers, establishes priorities for the distribution of the general account assets of an insurer's estate among claimants, including annuity contract claimants. Section 7435(a) specifies that, within each of the eight classes established for the distribution of assets, "[n]o subclasses shall be established."[4]

By requiring insurers to manage certain general account assets "solely in the interest of the [plan's] participants and beneficiaries

4. Section 7435(b) does permit an exclusion from the distribution priorities for claims under a "separate account":

> "Every claim under a separate account agreement providing, in effect, that the assets in the separate account shall not be chargeable with liabilities arising out of any other business of the insurer shall be satisfied out of the assets in the separate account equal to the reserves maintained in such account for such agreement . . . ."

Section 7435(b) is a statutorily created exclusion with no application to the general account funds at issue in this litigation.

and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries," the Second Circuit's decision in effect compels precisely the kind of "unfair discrimination" prohibited by Section 4224, and precisely the type of "subclass" explicitly rejected by Section 7435.[5] Under the Second Circuit's decision, an insurer faced with two contractholders—one an ERISA plan and one not—must favor the ERISA plan contractholder with fiduciary treatment to which the other is not entitled.[6] Even if the terms of their contracts were identical, federal law would superimpose a differentiation that is not there and was not there when the contracts were purchased. It would, for example, require insurers to make investment decisions for ERISA contractholders based upon a different standard from that applied to other contractholders of the same class, perhaps to the detriment of such other contractholders, and to allocate income and expenses to ERISA contractholders on a preferential basis. Such a result is inconsistent with the basic investment and income and expense allocation standards embodied in Articles 14 and 42 of the Insurance Law, and contrary to statutory provisions intended to promote equitable treatment of and avoid unfair discrimination

5. Because Section 7435 groups all claims made under insurance policies and annuity contracts in a single class, any disparity in the treatment of annuity contractholders based upon their status under ERISA would effectively create a subclass in violation of Section 7435.

6. Under New York law, an insurance company is not a fiduciary to its policyholders. *See, e.g., Rochester Radiology Associates, P.C. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985).

among the holders of policies or contracts.[7] This result contradicts ERISA's savings clause.

B. The Second Circuit's Decision Conflicts With New York's Statutory Scheme For Monitoring The Solvency Of Insurers

The underlying purpose of insurance is the provision of contractually specified benefits that may come due at some future date. The level of benefits, the date for their payment, or both may be unknown at the time of the issuance of the policy or contract. Assuring the ability of an insurer to meet these obligations is a central goal of New York's system of insurance regulation.

7. Section 1405 of the Insurance Law regulates generally the investments of life insurers. Section 4239 authorizes the Superintendent to promulgate regulations ". . . prescribing standards for the *equitable allocation of income and expenses* as among lines of business and as between investment expenses and insurance expenses" by life insurers (emphasis added). These standards, as established by Insurance Department Regulation No. 33, indicate that:—"It is the responsibility of each life insurer to use only such methods of allocation as will produce a suitable and equitable distribution of income and expenses . . . ." N.Y. Comp. Codes R. & Regs. tit. 11, § 91.4(a)(1).

Other provisions of the Insurance Law also prohibit discrimination of the type the Second Circuit's decision requires. Section 3201 of the Insurance Law authorizes the Superintendent to reject "any form of annuity contract . . . for delivery or issuance for delivery in this state, *if its issuance would be prejudicial to the interests of policyholders or members or it contains provisions which are unjust, unfair or inequitable.*" N.Y. Ins. Law § 3201(c)(2) (emphasis added). The Second Circuit's decision would effectively incorporate obligations into annuity contracts purchased by ERISA plans that would unfairly discriminate against other holders of general account contracts to which ERISA does not apply.

Requiring an insurer to act "solely in the interest" of a favored subgroup of participants and beneficiaries, however, would significantly frustrate the Superintendent's ability to monitor an insurer's solvency and financial well-being under the statutory accounting practices mandated by State law.

The basic and long-standing benchmark for review of an insurer's financial condition requires a comparison of the insurer's total "admitted assets" (as defined in Section 1301 of the Insurance Law) with the total amount of its reserves and other liabilities.[8] Admitted assets are grouped for statutory financial reporting purposes by category (*i.e.*, common stocks, preferred stocks, bonds, real estate, mortgage loans, etc.). No differentiation is made or required to be made based upon the source of the asset or the funds used to acquire it. Section 1301(a) of the Insurance Law requires that an "admitted asset" be "owned" by the insurer.

The Second Circuit's decision obstructs this scheme by bringing into question the status of funds subject to fiduciary treatment. It is no longer clear that these funds are "assets" beneficially owned by the insurer as the Department has previously understood and applied that term. If an insurer is regarded as an administrator of funds that it is not deemed to own (because they are plan assets), these funds might not be viewed as assets of the insurer available to be offset against its liabilities. Such an inability to treat those funds as admitted assets would create an imbalance in an insurer's admitted assets on the one hand and its reserves and other liabilities on the other, potentially creating the basis for a

8. Insurers licensed in the State are required to maintain a minimum "surplus to policyholders," as set forth in the Insurance Law, based upon the lines of business that they write. Section 107(a)(42) defines the surplus to policyholders as "the excess of total admitted assets over the liabilities of an insurer."

determination that it is insolvent.[9] Under New York statutory provisions, the Superintendent would then be authorized to suspend or revoke the license of a foreign or alien insurer or to place a domestic insurer in rehabilitation or liquidation.[10]

In essence, the Second Circuit's decision could be construed to create a new category of asset (if it is an asset of the insurer at all) not specifically authorized by State law. On the one hand, funds subject to ERISA fiduciary treatment are not necessarily general account assets against which the general liabilities of the insurer can be offset. On the other, it is clear that they are not separate account assets immune to such offsetting.[11] They are, apparently, a judicially created hybrid, a general account asset that may not be used to satisfy claims on the general account. This hybrid status, however, impermissibly discriminates against non-ERISA contractholders: whereas the liabilities owing to the non-ERISA contractholder are secured by the general account only—and not by the funds subject to ERISA fiduciary treatment—the liabilities owing to the ERISA contractholder would appear to be secured by

9. N.Y. Ins. Law § 1309(a).

10. N.Y. Ins. Law §§ 1309(b), 7402(a) and 7404.

11. Separate account assets, while assets of the insurer, may not be used to satisfy claims on the insurer's general account. Section 4240 of the Insurance Law, governing separate accounts, provides the exclusive means for insulating assets from general account liabilities. Such separate account assets are specifically excluded from the estate of a domestic life insurer in applying the scheme for the distribution of claims of Section 7435. To the extent that the Second Circuit's decision attempts to insulate assets from general account liabilities through its imposition of fiduciary treatment on certain assets in the general account, it does so inconsistently with Section 4240.

the segregated funds receiving fiduciary treatment *and* by the entire general account.[12]

C. Application Of The Second Circuit's Decision To Existing Contracts And Practices Would Massively Complicate The Regulation Of Insurance In New York

The application of the Second Circuit's decision retroactively will have an enormous impact both on the administration of the Insurance Law by the Department and on the insurance industry's handling of the billions of dollars already contributed under group annuity contracts such as GAC 50. The ruling will expose insurers to potentially large liabilities for breach of heretofore unimagined fiduciary obligations under ERISA—including challenges to investment, income allocation, and dividend practices that comply with State law—and will require them somehow to bring their general accounts into compliance with the court's decision.[13]

If upheld, the Second Circuit's decision would effectively require a two-tiered regulatory scheme that the Department would have to oversee in areas of insurance law involving ERISA-covered pension plans: one State-law tier applying to non-ERISA funds and

12. The Second Circuit's decision does not answer the complex question of *how* funds subject to fiduciary treatment would be identified and segregated from the currently unsegregated corpus of an insurer's general account.

13. Because this potential for liability (and the uncertainty regarding the status of general account assets subject to ERISA fiduciary obligations) would apply only to insurers writing ERISA-related business and would have the most severe impact on those insurers with the largest volume of such business, affirmance of the Second Circuit's decision could deter insurers from writing such contracts in the future.

ERISA funds not considered "plan assets," and one federal tier for funds deemed "plan assets." As demonstrated above, such a change would necessarily and extensively complicate the Department's regulation of insurance, including the Department's evaluation of the solvency of insurers.[14]

To avoid the unwarranted complication of the regulation of insurance by all fifty states, the Court should review and reject the Second Circuit's decision.

14. Until now, all general account assets of an insurer have been available to satisfy all of the insurer's general obligations, without regard to the identity or status of particular policyholders or contractholders. Insurers have to date prepared financial statements and the Department has reviewed them on that basis. The Second Circuit's decision, however, suggests that certain general account assets may not be available for those purposes, and therefore calls into question the accuracy of the information currently provided in such statements. It should be noted that a wide segment of the public, including policyholders, contractholders, lending institutions, investors, investment bankers, reinsurers, and other insurers, relies on insurers' statutory financial statements for accurate information regarding admitted assets and liabilities.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Attorney General of the State of New York, on behalf of the Superintendent of Insurance of the State of New York, respectfully urges that a Writ of Certiorari be granted.

January 21, 1993

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JOINT APPENDIX

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[1] References to pages of the Appendix included in the Petition for a Writ of Certiorari are cited as "PA-", followed by the page number.

Docket Entries, Southern District of New York

208 83 5401 07 20 83 110 1 1 3 M 36061 P

PLAINTIFFS

CHASE MANHATTAN BANK, N.A. as Trustee of the Sperry Master Retirement Trust No., 2 Caption amended 12/5/88 . . . GC HARRIS TRUST & SAVINGS BANK, as trustee of the Sperry Retirement Trust No. 2 (and its successor, the Unisys Master Trust).

CHASE MANHATTAN BANK, N.A. (substituted as pltff on 12/5/88 but remaining as a counterclaim deft.)

DEFENDANTS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

and 3rd Party Pltfff

V

SPERRY CORPORATION and THE RETIREMENT COMMITTEE OF SPERRY CORPORATION

3rd Party Defts.

CAUSE rl

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 U.S.C. 1332 Breach of Pension Contract

ATTORNEYS

REBOUL MACMURRAY HEWITT
MAYNARD AND KRISTOL
45 Rockefeller Plaza
New York NY 10111
841-5700

(Pltff & Sperry)
Anderson Russell Kill & Olick & OSHINSKY
666 Third Avenue
New York, NY 10017
(212) 850-0700

☐ Check here if case was filed in forma pauperis
Filing Fees Paid Date: Jul 20, 1983
Statistical Cards Date Mailed JS-6 8-16-91
United States District Court Docket Receipt Number 23247

DATE	NR.	PROCEEDINGS
07-20-83	1	Fld Complaint - Issued Summons and Notice purs to 28 U.S.C. 636c
08-02-83	(2)	Filed and affidavit of service by an individual served: John Hancock Mutual Life Ins. Co — to NY State Ins. Dept. Supt of Ins. by Rochelle D. Tolkoff, Senior Atty on 7-21-83
08-26-83	(3)	Filed stip and order extending time of deft John Hancock to answer complaint to Sept. 19, 1983 SO ORDERED. GOETTEL, J
09-16-83	(4)	Filed stip and order extending time of deft to answer complaint to Oct. 19, 1983 SO ORDERED. GOETTEL, J
10-20-83	(5)	Filed ANSWER RMMHMK
10-254-83	(6)	Filed Pltff's First request for production
10/27/83	7	Filed Notice of Reassignment of action to J. KEENAN. Notice Mailed,.
10/31/83	8	Filed pltff's notice of demand for jury trial.
11/22/83	9	Filed Stip & Order Re: Interrogs and documents. KEENAN, J.
1/19/84	10	Filed Stip & Order-pltffs time to answer interrogs and both parties time to produce documents is ext to 2/21/84. KEENAN, J.
3/15/84	11	Filed defts notice to take the Deps of G.B. Buck on 4/16, Johnson & Higgins on 4/18 and of Deloitte Haskins & Sells on 4/20/84. Subpoena issued.
3/15/84	12	Filed defts notice to take the Deps of R. Rskin on 4/23 and of George Swick on 4/25/84. Subpoena issued.
3/26/84	13	Filed Richard Raskins' notice of objs to the Dep subpoena svd on him by "Hancock".

3/26/84	14	Filed G.B.Bucks' objs to Dep Subpoena svd on them by "Hancock".
3/27/84	15	Filed Johnson & Higgins objs to the Dep subpoena duces tecum svd on it.
3/28/84	16	Filed Stip & Order-pltff may file and sv its amended complaint and the deft shall have 30 dys in which to answer. KEENAN, J.
4/2/84	17	Filed Order to have this action assigned to a Mag. to schedule and supervise the completion of discovery. KEENAN, J.
4/3/84	18	Filed Amended Complaint.
4/3/84	19	Filed pltff's Demand for Jury Trial with respect to the Amended Complaint.
4/3/84	20	Filed Order assigning this action to Mag. Grubin to schedule and supervice discovery. The Magistrate will notify the parties. BERNIKOW, J.
4/9/84	21	Filed designation of Merrill Greenstein to appear for Dep purs to deft's notice to take Dep dtd 3/15/84.
4/11/84	22	Filed pltffs' notice of motion to compel prod of documents, noted for 5/4/84 before Mag. Grubin.
4/11/84	23	Filed memo in Support of its Rule 37 motion to compel production.
4/25/84	24	Filed Deft's memo in opp to pltff's motion to compel further prod of documents.
5/3/84	25	Filed pltff's Reply Memo in further support of its Rule 37 motion to compel prod.
5/7/84	26	Filed Stip & Order-ext time for deft to answer to 5/30/84. KEENAN, J.

5/7/84	27	Filed Order-Scheduling discovery and production. GRUBIN, MAG.
5/31/84	28	Filed ANSWER and counterclaims. RMHM&K
5/31/84	29	Filed Third Party Complaint. 3rd Party summons issued.
6/1/84	30	Filed 3rd party summons w/ret of svc-The Retirement Committee of Sperry Corp. by Ronald Anderson Asst Scty on 5/31/84. Svd-Sperry Corp. by Ronald Anderson Asst Scty on 5/31/84.
6-21-84	31	Fld Stip & Order-Ext pltff's time to respond to deft's counterclaims to 7/20/84. Keenan, J.
7/20/84	32	Filed Sperry's ANSWER to the third party complaint of Joh Hancock Mutual Life. ARK&O
7/20/84	33	Filed pltff's Reply to Counterclaims of John Hancock Mutual Life. ARK&O
8/20/84	34	Filed Stip & Order-time for Hancock to obj to or answer interrogs is ext to 9/19/84. KEENAN, J.
4-11-86	35	Filed NOTICE OF REASSIGNMENT to Judge Cedarbaum, as of 4-10-86. m/c
9-11-86	--	PRE-TRIAL CONFERENCE HELD BY Mag Grubin.
11-12-86	--	PRE-TRIAL CONFERENCE HELD BY Mag Grubin
11-24-86	--	PRE-TRIAL CONFERENCE HELD BY Mag Grubin

11/26/86	*36*	*Fld. Order of Confidential Treatment, that the party filing any Confidential discovery material shall be responsible for informing the Clerk of the Court that the filing should be sealed & for placing the legend "to be Fld. Under Seal purs. to order of 11/26/86, etc. as indicated . . . Mag. Grubin Cmc*
1/23/87	*37*	*Fld. Order Amending Order of Confidential Treatment, that the Order is hereby amended by substituting the annexed form of exhibit A in place of the exhibit a originally annexed thereto..Mag. Grubin cmc*
3-11-87	--	Pre-Trial Conference Held By Mag Grubin
7-16-87	38	Filed transcript of record of proceedings dated 7/7/87 NFL
7-14-87	39	Fld ORDER, granting that Plaintiff's application for further information is denied, claim of privilege is upheld. So Ordered Grubin, M. CMC
8-11-87		PRE-TRIAL CONFERENCE HELD By Mag. Grubins
8-13-87	40	Filed transcript of record of proceedings dated *8/11/87* RFC
8-28-87	41	Fld. Plaintiffs Notice of Deposition upon oral examination of Gross Hyde & Williams on 9-23-87. RFC
10-2-87	42	Fld. Plaintiffs Notice of Deposition upon oral examination of deft John Hancock Mutual Life Insurance Company on 10-14-87. RFC

10-23-87	43	Fld. Plaintiff Notice of Deposition upon oral examination of John Thomas H. Hogan, Jr. On 11-19-87 Constance E. Williams 11-17-87 Stephen Lee Brown 11-24-87 Robert Clancy 12-1-87 David E. Sunderland 12-8-87 Alan R. Young 12-15-87 John R. Leen 12-17-87 John C. Penny 12-22-87 RFG
11-10-87	44	Fld. Plaintiffs Notice of Deposition upon oral examination of Donna Morrison on 12-17-87 and Samual E. Shaw on 1-6-88 and Sally Pearson on 1-12-88 Klaus Shigley on 1-19-88 Joseph Macauley on 1-26-88 Charles A. Pierce on 2-2-88 James W. Moriarty on 2-9-88 Philip Jefferson on 2-16-88 Arthur T. Connolly, Jr. on 2-23-88 George Gabriel on 2-26-88 Loring Powell on 3-1-88 Michael B. O'Toole on 3-8-88 E. James Morton on 3-15-88 Franklin E. Peters on 3-22-88 Henry H. Winslow on 3-29-88 Barry Shemin on 4-12-88 Robert Trapp on 4-15-88 Bertram Pike on 4-19-88 John G. McElwee on 4-26-88 (Filed in overnight box 11-10-87)
11-10-87	–	PRE-TRIAL CONFERENCE HELD By Mag. Grubin RFG
11-30-87	–	Pre-Trial Conference Held By Mag. Grubin RFG
11-24-87*	–	Pre-Trial Conference Held By Mag. Grubin RFG

11-24-87	–	PRE-TRIAL CONFERENCE HELD BY MGC
12-8-87	–	PRE-TRIAL CONFERENCE HELD BY MAG. GRUBIN
12-14-87	–	PRE-TRIAL CONFERENCE HELD By Mag. Grubin RFG
12-21-87	–	Pre-Trial Conference Held By Mag. Grubins RFG
1-5-88	–	PRE-TRIAL CONFERENCE HELD BY MAG GRUBIN
2-3-88	–	PRE-TRIAL CONFERENCE HELD BY MAG GRUBIN
2-2-88	–	PRE-TRIAL CONFERENCE HELD BY MAG GRUBIN
2-9-88	45	Fld. Plaintiffs Notice of Deposition upon oral examination of Franklin Peters on 2-19-88. RFG
2-16-88	46	Fld. ORDER with respect to plaintiffs application for further responses to interrogatories 6(iv), 26, 27 and 29 of its First Set of Interrogatories: granted as to interrogatory 6 (iv) etc. So Ordered Mag. Grubin CMC RFG
2-18-88	47	Fld Deft. John Hancock Mutual Life Insurance Company's Notice of Deposition upon oral examination of Lloyd Kaye, c/o Mercer-Meidinger-Hansen Incorporated on 2-22-88. HL
2-22-88	48	Fld Pltf's Objections to magistrate Grubin's Order Denying Pltf's Discovery Requests. HL

2-18-88	49	Fld. Stip. & Order of Deposition Schedule agreeded to by plaintiff and defendant. So Ordered Mag. Grubin
3-1-88	50	Fld. Deft's Response to Pltf's objections to Magistrate Grubin's Order Denying Pltf's Discovery Requests. HL
8/4/88	51	Fld. pltff's Affidavit of Filing of Joint Pre-Trail Order Volumes I & II under Seal. EM
7/29/88	52	Fld. one envelope ordered sealed & impounded per order of Judge Cederbaum dated 11/26/86. Contents: Vol. 1.
7/29/88	53	Fld. one envelope ordered sealed & impounded per order of Judge Cederbaum dated 11/26/86. COntents: Vol. 2. EM
9/16/88	–	Pre-Trial Conference Held By MGC EM
11/23/88	54	Filed transcript of record of proceedings dated 11/10/87 EM
11/23/88	55	Filed transcript of record of proceedings dated 12/21/87 EM
11/23/88	56	Filed transcript of record of proceedings dated 1/5/88 EM
11/25/88	57	Fld pltff's Notice of Motion for partial summary judgment. Returnable 2/3/89. EM.
11/25/88	58	Fld Memo in support of pltff's motion for partial summary judgment that deft is Erisa fiduciary. EM
11/25/88	59	Fld Affidavit of Lawrence Kill in support of pltff's motion for partial summary judgment. EM
11/25/88	60	Fld deft's Notice of Motion for an order dismissing pltff's amended complaint. Returnable 2/3/89. EM

11/25/88	61	Fld Memo of deft in support of motion for partial summary judgment. EM
12/5/88	62	Fld Order on Consent substituting parties. Harris Trust & Savings Bank shall be substituted in place of Chase Manhattan Bank, N.A. Chase Manhattan Bank, N.A. shall be realigned as a counterclaim deft . . . Cedarbaum, J. cmc
11/23/88	63	Fld one envelope ordered sealed & impounded per order of Judge Cedarbaum. Dated 11/23/88. Contents: night box.
12-16-88	64	Fld Order that pltff's application to compel pre-trial production of a memo dated 2/11/75 is denied . . . Cedarbaum, J. cmc EM
12-27-88	65	Fld Notice of Reassignment to Judge Patterson dated 12/20/88. cm EM
12-9-88	–	PRE-TRIAL CONFERENCE HELD BY J. CEDARBAUM
1-9-89	66	Fld. Deft Counterstatement purs. to civ. rule 3(g). NW
1-9-89	67	Fld. memorandum of deft John Hancock Mutual Life Ins. Co. in opposition to pltf's motion for partial summary judgment that deft is an Erisa Fiduciary. NW
1-9-89	68	Fld. Pltf's Memorandum in opposition to deft's motion for partial summary judgment. NW
1-4-89	–	PRE-TRIAL CONFERENCE HELD BY J. PATTERSON

1-30-89	69	Fld. Reply Memorandum of deft Hancock Mutual Life Ins. Co. in support of its motion for partial summary judgment upon agreed statement of facts. NW
1-30-89	70	Fld. Supplemental Affidavit of Lawrence Kill in further support of pltf's motion for partial summary judgment. NW
1-30-89	71	Fld. Pltf's Reply Memorandum in support of its motion for partial summary judgment that deft is an Erisa Fiduciary. NW
1-30-89	72	FLD. ONE ENV. ORDERED SEALED & IMPOUNDED PER ORDER OF MAG. GRUBIN DTD: 11-26-88. NW
1-30-89	73	FLD. ONE ENV. ORDERED SEALED & IMPOUNDED PER ORDER OF MAG. GRUBIN DTD: 11-26-88. NW
4-10-89	74	Fld. letter to J. Patterson dtd:4-7-89.
4-24-89	75	Filed Transcript of record of proceedings, dated 2-3-89
7/7/89	76	Fld. Notice of Name Change of counsel for plaintiff, counterclaim defendant and third-party defendants from Anderson Russell Kill & Olick to Anderson Kill Olick Oshinsky. sc
9-26-89	77	Fld. OPINION #64934,.. In conclusion, this Court holds that John Hancock is not a fiduciary with respect to the Sperry Rand Master Retirement Trust No. 2. Accordingly the deft's motion for partial summary judgment is granted, and the pltf's motion for partial summary judgment is denied. The first count of the pltf's amended complaint is hereby dismissed. PATTERSON J. cmc NW

9-26-89	78	Fld. OPINION & ORDER #64934,.. In conclusion, this court holds that John Hancock is not a fiduciary with respect to the Sperry Rand Master Retirement Trust NO. 2. Accordingly, the deft's motion for partial summary judgment is granted, and the pltf's motion for partial summary judgment is denied. The first count of the pltf amended complaint is hereby dismissed. PATTERSON, J. cmc NW
10-10-89	–	PRE-TRIAL CONFERENCE HELD BY J. PATTERSON
10-20-89	79	Fld. Pltf Notice of motion for an order for reconsideration of reargument, ret:11-3-89. NW
10-20-89	80	Fld. Pltf's memorandum of law in support of its motion for (a) reconsideration reargument, (b) supplementation of the record and (c) certificatiion for appeal of entry of final judgment. NW
11-1-89	81	Fld. Memorandum of deft John Hancock Mutual ins. Co. in opposition to pltf's motion for reargument or for permission to take an immediate appeal. NW
11-2-89	82	Memo-Endorsed on letter to J. Patterosn dtd: 11-1-89, Application granted pltf will serve its reply papers on 11-9-89—return date will be 11-15-89. PATTERSON, J. NW cmc
11-9-89	83	Fld. Pltf's Reply Memorandum in further support of its motion for (a) recons. of reargument, (b) supplementation of the record and (c) cert. for appeal or entry final judgment. NW

1-4-90	84	Fld. ORDER,.. Accordingly, pltf's motion for reargument is denied,. Pltf's motion denied in its entirety. PATTERSON, J. cmc NW
1-12-90	85	Fld. ORDER,.. Accordingly, the Court denies pltf's motion to supplement the record because of the absence of any directive or necessity in the interests of justice supplement the record upon the motion for reargument. Pltf's motion is denied in its entirety. PATTEROSN, J. cmc NW
1-30-90	86	Fld. Deft and thirdparty pltf Notice of motion for an order for summary judgment ret: 2-9-90. NW
1-30-90	87	Fld Deft and thirdparty pltf Memorandum in support of motion for summary judgment missing the remaining claims in pltf's amended complaint. NW
2-8-90	88	Memo-Endorsed on letter to J. Patterson dtd: 2-6-90, SO ORDERED. Pltf's papers in opposition 3-23-90, Hancock's reply papers 5-8-90, Oral argument 5-17-90 at 4pm PATTERSON, J. cmc NW
3-23-90	89	Fld. Pltf Affidavit of Roger G. Ibbotson. NW
3-23-90	90	Fld. Pltf Affidavit of Daniel J. McCarthy in support of opposition to motion. NW
3-23-90	91	Fld. Pltf Counterstatement purs. to civil rule 3(g). NW
3-23-90	92	Fld. Pltf Affidavit of Lawrence Kill in opposition to deft's motion for summary judgment. NW
3-23-90	93	Fld. Pltf Affidavit of Thomas V. Hirschberg in opposition to motion. NW

3-23-90	93	Fld. Pltf Affidavit of Thomas V. Hirschberg in opposition to motion. NW
3-23-90	94	Fld. Pltf memorandum of law in opposition to deft's motion to dismiss the remaining claims in the pltf's amended complaint. NW
3-30-90	95	FLD. ONE ENV. ORDERED SEALED & IMPOUNDED PER ORDER OF MAG. GRUBIN DTD:11-26-89. (2 ENVELOPES, NOTHING INDICATED) NW
4-10-90	96	Fld. Pltf's Exhibit Binder submitted in opposition to deft's motion to dismiss remaining claims in the pltf's amended complaint. NW
5-9-90	97	Fld. Thirdparty pltf Affidavit of Henry N. Winslow in support of motion. NW
5-9-90	98	Fld. Thirdparty pltf Reply Memorandum in support of its motion for summary judgment dismissing the remaining claims in pltf's amended complaint. NW
5-29-90	99	Fld. pltff's SUPPLEMENTAL MEMORANDUM in accordance with this court's authorization at oral argument 5-17-90. (received night deposit 5-29-90 at 5:15 pm) JL
7-12-90	100	Filed Transcript of record of proceedings, dated 5-17-90. –
7-12-90	101	Filed Transcript of record of proceedings, dated 5-17-90. –

11-15-90	102	Fld ORDER. . . that the parties appear for a hearing on 11-19-90 at 10 AM at the United States Courthouse at Foley Square, to present evidence pertaining to whether there are genuine issues of fact with respect to the issues pending before it on deft's motion for summary judgment. . . that pltff's counsel prepare & file with the Court no later than 11-29-90, a memorandum with citations to the record stating for which actions of deft, prior to 7-20-77, it seeks relief and the date upon which pltff first became aware of such actions, and what actions, if any, were taken by the pltff which would constitute reliance by pltff on those actions of deft. . . SO ORDERED. . . PATTERSON, J. cmc GQ
11-16-90	103	Fld. Memo Endorsed in letter to Judge Patterson dtd 11-15-90 requesting the Court use the time alresdy reserved on 11-19-90 for pre hearing conf . . . . application granted counsel should be prepared to present other witnesses then Mr. hershberg on 11-19, 20, 21-90 if possible So Ordered Patterson, J. LF
11-26-90	104	Fld. Memo to Clerk pretrial conf. held and concluded 11-19-90, counsel expected to contact the Judge on 11-21-90. LF
11/29/90	105	Fld. Plaintiff's Memorandum. . . purs. to the Court's 11/14/90 Order etc. SC
12-18-90	106	Fld. Order. . . the parties are reminded to have all witnesses present having personal knowledge of the facts in connection with the two issues before the Court at the Rule 43(e) hearing which was adjourned to 12-20-90 at 2:00 pm. . . So Ordered Patterson, J. LF

1-18-91	107	Fld. Memo Endorsed on letter to Judge Patterson dtd 1-17-91 regarding filing of summary judgment motion on 2-15-91 . . . approved So Ordered Patterson, J. LF
2-15-91	108	Fld. Post-Hearing Memo of deft John Hancock Mutual Life Insurance Company in further support of its motion for summary judgment. (recv'd in NB 2-15-91 6:02 pm)
2-19-91	109	Fld. Post-Hearing Brief. LF
3-5-91	110	Transcript of record of proceedings, dated 12/20/90 LF
3-5-91	111	Transcript of record of proceedings, dated 12/14/90 LF
3-25-91	112	Transcript of record of proceedings, dated 1/8/91 LF
7-12-91	113	Fld OPINION AND ORDER # 68325 . . . that deft's motion for summary judgment dismissing pltff's contract and common law claims is granted. This case is hereby ordered closed. . . SO ORDERED . . . PATTERSON, J. cmc GQ
8-6-91	114	Fld ORDER AMENDING OPINION, of the opinion signed and fld on 7-12-91, . . . SO ORDERED PATTERSON, J. CD

8-12-91	115	Fld MEMO ENDORSED on letter dated 8-9-91 to Judge Patterson from John B. Berringer In Re: Pltff atty request that the Court clarify when its time to appeal the Court decision runs out...COUNSELS TIME TO FILE AN APPEAL SHOULD RUN FROM 8-6-91. THE COURT REGARDS THE CHANGES MADE IN THE OPINION OF 8-12-91 AS CORRECTIONS OF MISCITATIONS AND A CLARIFICATION OF THE MEANING OF THE FOOTNOTE...SO ORDERED...PATTERSON, J. cmc GQ
8-16-91	116	Fld JUDGMENT...that deft's motion for summary judgment dismissing pltff's contract and common law claims is hereby granted...that pltff's complaint is hereby dismissed in its entirety...that deft's counterclaims and its third-party complaint are hereby dismissed as moot. JAMES M. PARKINSON, CLERK. EOD: 8-16-91. GQ
8-16-91	–	Mailed copy of Judgment & Appeal Forms to all party attys. GQ
9-4-91	117	Fld pltff's NOTICE OF APPEAL to the U.S.C.A. for the Second Circuit from the Opinion and Order dated 9-26-89, the order dated 1-4-90, the order dated 1-4-90, the order dated 1-12-90, the order dated 11-15-90, the Opinion and Order dated 7-12-91, the Order Amending Opinion dated 8-6-91 and the Judgment dated 8-16-91. GQ
9-5-91	–	Mailed copy of Notice of Appeal to: Reboul, MacMurray, Hewitt, Maynard & Kristol. GQ

9-5-91	–	Forwarded copy of Notice of Appeal to District Judge & copy of Notice of Appeal & docket entries to Court of Appeals. GQ
10-18-91	118	Fld NOTICE TO THE DOCKET CLERK that the Original Record on appeal in the above entitled action has been certified and transmitted to the U.S.C.A. for the Second Circuit on 10/18/91. GQ
11-12-91	119	Fld STIPULATION AND ORDER ... that exhibits admitted in hearings before Judge Patterson on 12/14/90, 12/20/90 and 1/8/91 shall be added to the record on appeal of the captioned action and shall be transmitted to the Court of Appeals ... that documents number 41 and 42 on the index to Record on Appeal are misdated. The correct date of these documents is 8/11/87 ... SO ORDERED...PATTERSON, J. GQ
11-12-91	120	Fld NOTICE TO THE DOCKET CLERK that the 1st Supplemental Record on appeal in the above entitled action has been certified and transmitted to the U.S.C.A. for the Seocnd Circuit on 11/12/92.

A TRUE COPY
JAMES M. PARKINSON, Clerk

By: /s/David M. Ortiz
Deputy Clerk

U.S. District Court
Southern District of New York – Civil Database (Foley Square)

CIVIL DOCKET FOR CASE #: 83-CV-5401

Filed: 11/30/92

Chase Manhattan Bank v. John Hancock Mutual
Assigned to: Judge Robert P. Patterson
Judge Robert P. Patterson
Demand: $0,000 Nature of Suit: 110
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: breach of contract

CHASE MANHATTAN BANK, as Trustee of the Sperry Master Retirement Trust No. 2 (Caption amended 12/5/88: Harris Trust & Savings Bank, as Trustee of the Sperry Retirement Trust No. 2 and its successor, the Unisys Master Trust) Chase Manhattan Bank (remaining as counterdefendant) plaintiff	Anderson Russell Kill Olick & Oshinsky [COR LD NTC] Anderson Russell Kill Olick & Oshinsky 666 Third Ave. New York, NY 10017 212/850-0700

v.

- JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, A MASSACHUSETTS CORPORATION.
defendant

JOHN HANCOCK MUTUAL LIFE INS. CO. third-party plaintiff	Reboul Macmurray [COR LD NTC] Reboul Macmurray Hewitt Maynard & Kristol 45 Rockefeller Plaza New York, NY 10111 212/841-5700

v.

SPERRY CORPORATION
third-party defendant

THE RETIREMENT COMMITTEE OF SPERRY CORPORATION
third-party defendant

Proceedings include all events.
1:83cv5401 Chase Manhattan Bank v. John Hancock Mutual

8/16/91	–	Case closed (gq) [Entry date 08/19/91]
11/23/92	–	Case reopened (sc) [Entry date 11/30/92]
11/23/92	121	MANDATE OF USCA (certified copy) Re: USDC Judgment dtd. 8/16/91... Ordered, that the judgment of the USDC is affirmed in part, reversed in part and remanded to the said district court for further proceedings etc. CLERK, USCA EOD: 11/25/92 (copy sent to district judge) (sc) [Entry date 11/30/92] [Edit date 12/04/92]
1/4/93	158	Letter (filed as per RPP) to Judge Patterson from Howard G. Kristol dated 12/22/92 in re: request to defer any further proceedings in this case until the Supreme Court has disposed of the petition or until counsel has informed Your Honor of a desire to proceed (emil)

Certified as a true copy on this date 3/23/93
By: Peter N [illegible]
Deputy

Docket Entries, Court of Appeals for the Second Circuit

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Filed: 9/6/91

Court of Appeals Docket #: 91-7854
Nsuit: 3110 CONTRACT - Insurance
Harris Trust v. John Hancock Mutual, et al
Appeal from: U.S. District Court SDNY

Case type information:
1) Civil
2) Private
3) none

Lower court information:

District: 0208-01: 83-cv-5401
Trial judge: Robert P. Patterson, Jr.
Date Filed: 7/20/83
Date order/judgment: 8/16/91
Date NOA filed: 9/4/91

Fee status: paid

Prior cases:
None
Current cases:
None

Panel Assignment:
Panel: RJM WF WHT 1705 :CA2 2/11/92 am
Date of decision: 7/30/92

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
By /s/Carolyn Clark Campbell
Chief Deputy Clerk

Proceedings include all events.
91-7854 Harris Trust v. John Hancock Mutual, et al.

HARRIS TRUST AND SAVINGS BANK, as Trustee for the Sperry Master Retirement Trust # 2 Plaintiff - Appellant	Lawrence Kill, Esq. 212-850-0722 [COR LD NTC ret] Anderson, Kill, Olick & Oshinsky 666 3rd Ave. New York, NY 10017
v.	
JOHN HANCOCK MUTUAL LIFE INSURANCE CO. Third-Party-Plaintiff	
v.	
SPERRY CORPORATION Third-Party-Defendant	
RETIREMENT COMMITTEE OF SPERRY CORPORATION Third-Party-Defendant	

JOHN HANCOCK MUTUAL LIFE INSURANCE CO. Defendant-Appellee	Howard G. Kristol, Esq. [COR LD NTC ret] Reboul, Macmurray, Hewitt, Maynard & Kristol 45 Rockefeller Plaza New York, NY 10111
v.	
CHASE MANHATTAN BANK, N.A. Counterclaim-Defendant	Phillip E. Stano, Esq. 202-624-2183 [COR LD NTC ret]
AMERICAN COUNCIL OF LIFE INSURANCE Amicus Curiae	Stephen W. Kraus, Esq. 202-624-2183 [COR LD NTC ret]

	American Council of Life Insurance 1001 Pennsylvania Ave., NW Washington, DC
	James F. Jorden, Esq. 202-965-8100
	Suite 400E [COR LD NTC ret] Stephen H. Goldberg, Esq. 202-965-8100 Suite 400 [COR LD NTC ret] Waldemar J. Pflepsen, Jr., Esq. 202-965-8100 Suite 400 [COR LD NTC ret] Perry Ian Cone, Esq. 202-965-8100 Suite 400 [COR LD NTC ret] Jorden, Schulte & Burchette 1025 Thomas Jefferson St., NW Washington, DC 20007
	Richard E. Barnsback, Esq. 202-624-2183 [COR LD NTC ret] American Council of Life Insurance 1001 Pennsylvania Ave., NW Washington, DC 20004
LYNN MARTIN, Secretary of Labor Amicus Curiae	Timothy Hauser, Esq. 202-523-8637 [COR LD NTC ret] U.S. Dept. of Labor Office of the Solicitor 200 Constitution Ave., NW Washington, DC 20210

Official Caption[1]

Docket no. 91-7854

HARRIS TRUST AND SAVINGS BANK, as Trustee for the Sperry Master Retirement Trust # 2

Plaintiff-Appellant,

v

JOHN HANCOCK MUTUAL LIFE INSURANCE CO.

Defendant-Appellee,

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Third-Party-Plaintiff,

v

CHASE MANHATTAN BANK, N.A.,

Counterclaim-Defendant,

and

SPERRY CORPORATION and THE RETIREMENT COMMITTEE of SPERRY CORPORATION,

Third-Party Defendants.

Authorized Abbreviated Caption[2]

Docket no. 91-7854

HARRIS TRUST V JOHN HANCOCK MUTUAL

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[1] Fed. R. App. P. Rule 12(a) and 32(a).

[2] For use on correspondence and motions only.

2/11/91	Appellee JOHN HANCOCK LIFE INSURANCE CO., letter dated December 10, 1991i re: caption, received. (ono)
9/6/91	Copy of district court docket entries and notice of appeal on behalf of Appellant Harris Trust filed. [91-7854] Form C due on 9/14/91. Form D due on 9/14/91. (com)
9/13/91	Copy of district court order, dated 7/31/91 filed (com)
9/13/91	Copy of district court Judgment, dated 8/16/91 filed. (com)
9/13/91	Appellant Harris Trust Form C filed, with proof of service. [91-7854] Form C deadline satisfied. (com)
9/13/91	Appellant Harris Trust Form D filed, with proof of service. [91-7854] Form D deadline satisfied. (com)
9/30/91	Scheduling order #1 filed. Record on appeal due on 10/23/91. Appellant's brief and appendix due on 10/30/91. Appellee's brief due on 11/29/91. Argument as early as week of 1/6/92. (Pre-Argument Conference scheduled for 10/11/91 at 2:30 pm). (com)
10/11/91	New scheduling order number 2 filed. New record on appeal due date is 11/12/91. New appellant's brief due date is 11/18/91. New appellee's brief due date is 12/18/91. New argument week as early as 1/6/92. (onc)
10/23/91	Record on appeal filed. (Original papers of district court.) Number of volumes: 8 (rea)

11/12/91	First supplemental record on appeal filed. Volumes: one. (onf)
11/18/91	Appellant Harris Trust brief RECEIVED. Problem: incorrect caption.. (onf)
11/18/91	Joint appendix received. Number of volumes: three. Problem: awaiting correction of caption. (onf)
11/19/91	Notice of appearance form on behalf of Lawrence Kill, Esq., received. (Orig. to Calendar) (rea)
11/20/91	Letter received from John B. Berringer, attorney for the appellant, stating that our official caption is not appropriate. (cc: Stanley Bass) (onc)
12/11/91	Letter received from Robert Peak giving his version of what the caption should look like based on the district court briefs. (onf)
12/18/91	Appellee John Hancock Mutual brief RECEIVED. Problem: awaiting filing of appellant's brief when appropriate caption has been decided upon. (onf)
12/19/91	The CAPTION PAGE for this appeal has been AMENDED. (unj)
12/19/91	New party added: American Council of Life Insurance as movant to file brief as amicus curiae in support of appellee. (unj)
12/19/91	Movant American Council of Life Insurance motion to participate as amicus curiae and to file brief as amicus curiae FILED (w/pfs). [241525-2] (unj)
12/19/91	Movant American Council of Life Insurance brief received. Problem: motion pending. (unj)

12/19/91	Movant American Council of Life Insurance addendum to brief RECEIVED. Problem: motion pending (unj)
12/19/91	Appellant Harris Trust brief FILED with proof of service. (onf)
12/19/91	Appellant Harris Trust joint appendix filed w/pfs. Number of volumes: three. (onf)
12/19/91	Appellee John Hancock Mutual brief filed with proof of service. (onf)
12/20/91	Notice of appearance form on behalf of James F. Jorden, Esq., received. (Orig. to Calendar) (rea)
12/30/91	Order FILED GRANTING motion to participate as amicus [241525-1] by Movant Amer Council Life In, endorsed on motion form dated 12/19/91., GRANTING motion to file brief as amicus curiae [241525-2] by Amicus Curiae Amer Council Life In, endorsed on motion form dated 12/19/91. (unv)
12/30/91	Amicus Curiae Amer Council Life In brief filed with proof of service. (unv)
12/30/91	Amicus Curiae American Council Life Insurance Addendum (supplemental brief) to Amicus Curaie brief filed with proof of service. (unv)
1/2/92	Appellant Harris Trust reply brief filed with proof of service. (onf)
1/3/92	Proposed for argument the week of 2/10/92. (cac)
1/15/92	Set for argument on 2/11/92. [91-7854] (cac)
1/15/92	Appellant Harris Trust motion to adjourn oral argument FILED (w/pfs). [248142-1] (onc)

1/22/92	Order FILED DENYING motion adjourn oral argument [248142-1] by Appellant Harris Trust, endorsed on motion dated 1/15/92. (cal)
1/30/92	Appellant Harris Trust motion to reconsider motion for adjournment FILED (w/pfs). [254244-1] (cal)
2/3/92	Order FILED DENYING motion to reconsider motion for adjournment of oral argument [254244-1] by Appellant Harris Trust, endorsed on motion dated 1/30/92. (cal)
2/11/92	Case heard before FEINBERG, TIMBERS, MINER, C.JJ. (TAPE: #128) (caa)
2/12/92	Appellee John Hancock Mutual 28(J) letter received. (cc: Panel) (onc)
2/12/92	Letter sent to : Mashall J. Breger, Esq., Solitor of Labor, U.S. Department of Labor, inviting the Department of Labor to submit an amicus brief. (onc)
2/12/92	Letter sent to : Marshall J. Breger, Esq., Solitor of Labor, U.S. Department of Labor, referring to previous letter and asking that if invitation to submit brief is accepted, the brief should be submitted within 30 days of the receipt of this letter. (onc)
3/5/92	New party added: Lynn Martin, Secretary of Labor as amicus curaie on appeal. (unv)
3/5/92	Amicus Curiae Lynn Martin motion to extend time to file Amicus Curiae Brief FILED (w/pfs). [264419-1] (onc)

3/11/92	Order FILED GRANTING motion for extending time to May 12, 1992 [264419-1] by Amicus Curiae Lynn Martin, endorsed on motion form dated 3/5/92. (onc)
5/12/92	Letter received from Marshall J. Breger, Solicitor of Labor, declining to accept the Court's invitation to file a brief. (onc)
7/30/92	Judgment AFFIRMED IN PART, REVERSED IN PART and REMANDED by published signed opinion filed. (RJM). (ona)
7/30/92	Judgment filed. (ona)
8/13/92	Appellee John Hancock Mutual PETITION FOR REHEARING, petition for rehearing in banc [309114-2] with proof of service filed. (ona)
8/13/92	Amicus Curiae Amer Council Life In motion to file brief as amicus curiae in support of Appellee's petition for rehearing and suggestion for rehearing en banc. FILED (w/pfs). [309353-1] (unv)
8/13/92	Amicus Curaie American Counseil of life Insurance's brief in support of Appellee's petition for rehearing and suggestion for rehearing received. amicus curiae brief received. Problem: awaiting motion disposition. (unv)
8/24/92	Order FILED GRANTING motion to file brief as amicus curiae [309353-1] by Amicus Curiae Amer Council Life In, endorsed on motion form dated 8/13/92. (ona)
8/24/92	Amicus Curiae Amer Council Life In PETITION FOR REHEARING, petition for rehearing in banc [311074-2] with proof of service filed. (ona)

9/23/92	Order FILED DENYING petition for REHEARING [311074-1] by Amicus Curiae Amer Council Life In, endorsed on motion dated 8/24/92. , DENYING petition petition for rehearing in banc [311074-2] by Amicus Curiae Amer Council Life In, endorsed on motion dated 8/24/92. , DENYING petition for REHEARING [309114-1] by Appellee by John Hancock Mutual, endorsed on motion dated 8/13/92. , DENYING petition petition for rehearing in banc [309114-2] by Appellee by John Hancock Mutual, endorsed on motion dated 8/13/92. (ona)
9/25/92	Appellee John Hancock Mutual motion to stay the mandate FILED (w/pfs). [320727-1] (ona)
10/5/92	Order FILED GRANTING motion to stay issuance of mandate, pending filing by movant of a petition for a writ of certiorari and final disposition by the U.S. Supreme Court [320727-1] by Appellee by John Hancock Mutual, endorsed on motion form dated 9/25/92. (ona)
11/3/92	Appellee John Hancock Mutual motion for extension of time of stay of mandate FILED (w/pfs). [332267-1] (ona)
11/12/92	Order FILED DENYING motion for extended time [332267-1] by Appellee by John Hancock Mutual, endorsed on motion dated 11/3/92. (ona)
11/16/92	Judgment MANDATE ISSUED. (cme)
12/16/92	Record on appeal RETURNED to lower court. No. of volumes: 8 (ref)
12/28/92	Notice of filing petition for writ of certiorari for Appellee John Hancock Mutual dated 12.22.92 filed. Supreme Ct#: 92-1074. (ona)

2/8/93	Notice of filing petition for writ of certiorari for Appellant Harris Trust dated 1.21.93 filed. Supreme Ct#: 992-12259. (ona)

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHASE MANHATTAN BANK, N.A. as Trustee of the Sperry Master Retirement Trust No. 2, Plaintiff,	:	Civil Action No.
-against-	:	COMPLAINT
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Defendant.	:	

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Plaintiff, by its attorneys Anderson Russell Kill & Olick, P.C., for its complaint herein alleges:

THE PARTIES

1. The plaintiff Chase Manhattan Bank, N.A. ("Chase") is a corporation organized and existing under the laws of the United States and has its principal office in New York, New York. Pursuant to an agreement dated October 1, 1976 and effective May 1, 1978, Chase became and has continued to act as the trustee for the Sperry Master Retirement Trust No. 2 which was established for the benefit of employees of Sperry Corporation and its participating subsidiary companies (plaintiff herein is sometimes referred to as "Sperry Trust" and "Sperry Trust" hereafter shall mean Sperry Corporation before May 1, 1978 and Chase after May 1, 1978). The Sperry Master Retirement Trust No. 2 at all times has been located in the State of New York. Sperry Corporation is organized and existing under the laws of the State of Delaware and has its principal office in New York, New York.

2. Defendant John Hancock Mutual Life Insurance Company ("Hancock") is a Massachusetts corporation having its principal

place of business in Boston, Massachusetts. Hancock is licensed, is doing business and has offices within the State of New York. From at least as early as 1967 through and including 1975, Hancock acted as actuary for Sperry Corporation.

THIS ACTION AND JURISDICTION

3. This action involves breaches of contract and misconduct on the part of Hancock in connection with a group annuity pension contract under which Hancock holds approximately $120 million as of the date of this complaint to provide retirement benefits to Sperry Corporation employees eligible under the Sperry Retirement Program to receive such benefits ("eligible employees"). A substantial and material portion of such amount has been and is unnecessary to provide such benefits and has been wrongfully accumulated and retained by Hancock to the detriment and damage of Sperry Trust and eligible employees.

4. This action involves citizens of different states and exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000). Jurisdiction of this Court is based upon 28 U.S.C. § 1332.

FACTUAL BACKGROUND

A. The 1941 Group Annuity Contract

5. In 1941, Sperry Corporation entered into a Group Annuity Contract, No. 50 GAC ("GAC 50"), with Hancock to provide for the purchase of deferred annuities payable to Sperry Corporation employees upon retirement funded by contributions of Sperry Corporation eligible employees and of Sperry Corporation in accordance with rate tables prepared by Hancock and annexed to GAC 50. Effective May 1, 1978, Chase, as Trustee under the Sperry Master Retirement Trust No. 2, was substituted for Sperry Corporation as the GAC 50 contract holder.

B. The 1968 Amendment

6. GAC 50 was amended effective January 1, 1968 (the "1968 Amendment"). The 1968 Amendment was drafted, prepared and submitted to Sperry Trust by Hancock. The 1968 Amendment provided for cancelling deferred annuities purchased for Sperry Corporation employees and placing the resulting funds in a Pension Administration Fund.

7. The Pension Administration Fund was established under the 1968 Amendment to provide funds to pay benefits to Sperry Corporation eligible employees. The amount in the Pension Administration Fund was required to be maintained at a level sufficient to purchase annuities to provide benefits to all Sperry Corporation eligible employees. The amount so required to be in the Pension Administration Fund under the 1968 Amendment was to be not less than an amount determined annually by Hancock. That annual amount was not to be less than the "Liabilities of the Fund."

8. The Liabilities of the Fund to be determined by Hancock each year under the 1968 Amendment were the aggregate of (i) the amount necessary to purchase annuities that had been cancelled on January 1, 1968, (ii) the amount necessary to purchase annuities (in addition to annuities covered by (i)) for eligible employees who had retired during each year after 1967 and (iii) a contingency reserve. Under the 1968 Amendment, the annual amount required to be in the Pension Administration Fund was to equal 100% of the Liabilities of the Fund. The 1968 Amendment also provided for the existence of a Supplemental Fund (known as Separate Investment Account No. 18 from June 30, 1976 to August 1, 1979) at the option of Sperry Trust. In the event such Fund in fact was established and existed, the annual amount required to be in the Pension Administration Fund and the Supplemental Fund was to be 105% of the Liabilities of the Fund.

9. The major component of the Liabilities of the Fund was the amount that would be necessary to purchase annuities. That

amount was determined by Hancock utilizing rate tables which were prepared by Hancock in 1968. These rate tables incorporated interest factors determined solely by Hancock. At the time of Sperry Trust's entry into the 1968 Amendment and thereafter and in determining the rate tables to be used in 1968 and thereafter, Hancock acted for Sperry Trust as an actuary and also utilized its unique expertise and knowledge in the fields of insurance and investment management.

10. Under the 1968 Amendment, in any year the Pension Administration Fund did not equal the Liabilities of the Fund (or 105% thereof if a Supplemental Fund existed) as annually determined solely by Hancock, Sperry Trust would be required to contribute an amount so that the Pension Administration Fund would be at the required level. If Sperry Trust failed to make such a required contribution, Hancock was empowered to terminate GAC 50 and to retain for itself amounts in GAC 50 including amounts in excess of the Liabilities of the Fund, contingency reserve amounts and amounts that would result from Hancock's actual purchase of annuities at costs substantially below the annuities' costs used to calculate the Liabilities of the Fund.

C. The 1977 Amendment

11. Effective August 1, 1977, Sperry Trust and Hancock amended GAC 50 (hereinafter the "1977 Amendment"). As a result of the 1977 Amendment, the Liabilities of the Fund were limited to the amount necessary to purchase annuities cancelled on January 1, 1968 and an amount necessary to purchase annuities in excess of those cancelled on January 1, 1968 for eligible employees who retired between January 1, 1968 and the August 1, 1977 Amendment. As a consequence, the number of employees and their entitlement to retirement benefits under GAC 50 were fixed as to the amount required to be used to calculate the Liabilities of the Fund. The 1977 Amendment also provided a means for Sperry Trust to pay additional benefits through GAC 50 on a current basis to eligible employees by defining into two categories the benefits to be provided under

GAC 50: (a) guaranteed benefits, and (b) non-guaranteed benefits. Guaranteed benefits are benefits under the Sperry Retirement Program ("Sperry Retirement Program" is defined in the 1968 Amendment as "Plan" which term will be used hereafter) covered in the Liabilities of the Fund. Non-guaranteed benefits are all benefits (other than guaranteed benefits) to be paid to retired employees of Sperry Corporation pursuant to the Plan. The 1977 Amendment specifically provided that Sperry Trust could provide non-guaranteed benefits from any monies in the Pension Administration Fund in excess of the amount calculated as the Liabilities of the Fund. At all times since the 1977 Amendment, as Hancock has acknowledged, the Pension Administration Fund has been more than sufficient to cover payments of non-guaranteed benefits designated under the Plan.

D. Hancock Payments of Non-Guaranteed Benefits

12. Pursuant to the 1977 Amendment, Hancock had been paying, on a monthly basis, non-guaranteed benefits from Pension Administration Fund excess funds to retired employees designated under the Plan.

13. On March 24, 1982, the Plan was amended to include within the categories of eligible employees covered by GAC 50, retired employees of the Univac Division of Sperry Corporation.

14. By letter dated April 27, 1982, Hancock was informed that non-guaranteed benefits were to be paid to retired employees of the Univac Division with a Benefit Commencement Date of May 1, 1982.

15. By letter dated May 14, 1982, Hancock refused to pay the non-guaranteed benefits to the retired employees of Sperry Corporation's Univac Division. In the same letter, Hancock agreed to continue the non-guaranteed benefit payments that it had been making prior to May 1982.

16. By letter dated May 24, 1982, Sperry informed Hancock that it considered Hancock's failure to pay the non-guaranteed benefits called for in Sperry's April 27, 1982 letter to Hancock to be a material breach of GAC 50 and again demanded payment of all non-guaranteed benefits.

17. By letter dated May 25, 1982, Sperry demanded payment of non-guaranteed benefits for June 1982.

18. By check dated May 26, 1982, and delivered to Sperry on May 27, 1982, Hancock paid all non-guaranteed benefits for May and June 1982.

19. By letter dated May 27, 1982, Hancock informed Sperry that it would cease making payments of all non-guaranteed benefits, including non-guaranteed benefits that Hancock had been paying since the effective date of the 1977 Amendment.

20. By letter dated June 2, 1982, Sperry demanded that Hancock continue to pay non-guaranteed benefits.

21. By letter dated June 14, 1982, Hancock reiterated its refusal to pay non-guaranteed benefits then or in the future.

22. After June 1982, Hancock has failed to make payments of any non-guaranteed benefits.

23. At all relevant times the excess funds in the Pension Administration Fund have been and continue to be sufficient in amount to provide the non-guaranteed benefits demanded by Sperry Trust which Hancock has refused to pay.

E. Excess Funds Retained by Hancock Under GAC 50

24. The amount of excess funds in the Pension Administration Fund under GAC 50 is dependent upon the proper calculation of the Liabilities of the Fund.

25. The method employed by Hancock each year to determine the Liabilities of the Fund has been to utilize rate tables it established in 1968 as part of the 1968 Amendment. Upon information and belief, Hancock's rate tables use interest rates of between 2-1/2% and 3% and those interest rates have never been changed by Hancock and have been determined by Hancock every year since the 1968 Amendment in Hancock's annual determination of the Liabilities of the Fund.

26. Under the 1968 Amendment, Hancock adjusts the Pension Administration Fund (i) by deducting administrative and operational expenses and (ii) by adding actual net interest earned (less no more than 1%) on assets attributable to the Pension Administration Fund. Hancock refers to the rate basis for its calculation of such net interest as the "case rate."

27. At all times since at least the 1977 Amendment, the Pension Administration Fund (including the annual case rate additions) has been substantially and increasingly greater than the Liabilities of the Fund as annually determined by Hancock with the result that Hancock in contravention of the 1968 and 1977 Amendments has each year continued to accumulate and retain excess funds in the Pension Administration Fund.

28. Hancock has admitted that as of January 1, 1982 there was approximately $20 million excess in the Pension Administration Fund utilizing the 1968 rate tables' 2-1/2% to 3% interest factor in Hancock's calculation of the Liabilities of the Fund.

29. If Hancock's case rate interest factor (applied by Hancock for actual interest added to the Pension Administration Fund) is applied in determining the Liabilities of the Fund, the excess in the Pension Administration Fund would increase from the $20 million excess admitted by Hancock to approximately $60 million.

30. If a current interest rate factor is applied in determining the Liabilities of the Fund, the excess in the Pension Administration Fund would increase from the $20 million excess admitted by Hancock to approximately $75 million.

31. Sperry Trust has demanded return of the excess funds in the Pension Administration Fund.

32. Hancock has refused to return the excess funds as demanded by Sperry Trust. During 1982 Hancock had been willing to return some of the excess funds, but only after first imposing numerous conditions, including various charges such as an asset liquidation adjustment and additional risk charges, and then only over a period of five years.

F. **Asset Liquidation Adjustment**

33. The 1968 Amendment (Article III, Section 9 of GAC 50) provides for the transfer to Sperry Trust of the amount equal to the excess in the Pension Administration Fund over the amount of the Liabilities of the Fund. Under the 1968 Amendment, the transfer is to be the full amount of such excess, except in the limited circumstance set forth in the 1968 Amendment where it would be necessary for Hancock to liquidate investments to provide the excess amount to be transferred. Under the 1968 Amendment, adjustment of the amount to be transferred (either an increase for gains or a decrease for losses) would arise and be applicable only if liquidation of Hancock's investments was necessary and actually occurred to provide the excess amount to be transferred. The adjustment is termed an "Asset Liquidation Adjustment" in the 1968 Amendment. On information and belief, since the 1968 Amendment Hancock each year has had on hand and available amounts sufficient to transfer to Sperry Trust the excess in the Pension Administration Fund without any necessity for Hancock to liquidate investments to provide the excess amount transferrable to Sperry Trust.

34. Hancock has stated that an Asset Liquidation Adjustment is necessary despite the availability of funds to pay transfers, in order to allow Hancock to adjust the values carried on Hancock's books for assets (e.g., face amount of bonds) to actual market values at the time of any transfer of funds from the Pension Administration Fund. This Hancock adjustment, in addition to ignoring the availability of funds to pay transfers,

disregards (i) Hancock assets that matured each year at full book values, (ii) Hancock reinvestment of assets at current interest rates and (iii) Hancock's ability and obligation to transfer excess funds each year to Sperry Trust.

G. **Hancock's Confidential and Fiduciary Relationship with Sperry Trust**

35. As a result of Hancock's unique expertise and knowledge as an insurance carrier and Hancock's being and having acted as actuary and pension advisor for Sperry Trust, Hancock had and has a confidential and fiduciary relationship with Sperry Trust with duties and obligations to Sperry Trust arising from such relationship with respect to GAC 50 and in particular the 1968 Amendment, the 1977 Amendment, the annual determinations of the Liabilities of the Fund and the existence, amount and use of excess funds in the Pension Administration Fund.

36. Sperry Trust relied upon the representations, disclosures and actions of Hancock in connection with GAC 50.

H. **Sperry Trust's Performance of Obligations**

37. Sperry Trust has performed all its obligations under GAC 50.

FIRST CAUSE OF ACTION

38. Plaintiff repeats and realleges paragraphs 1 through 37, with the same force and effect as if set forth herein at length.

39. Hancock has breached GAC 50 by failing to pay non-guaranteed benefits and by refusing to pay non-guaranteed benefits in the future.

40. As a result of Hancock's breach of GAC 50, Sperry Trust has been damaged and will continue to be damaged in an amount in excess of $1,200,000 per month, the exact amount

of the aggregate damage to be determined at trial. Since Hancock's refusal to pay non-guaranteed benefits was and continues to be wrongful, wanton, malicious and fraudulent in violation of the rights and entitlements of plaintiff and its numerous eligible employees, all contrary to public policy, plaintiff is entitled to an award of punitive damages in an amount not less than twice the aggregate damage to be determined at trial.

SECOND CAUSE OF ACTION

41. Plaintiff repeats and realleges paragraphs 1 through 37, and 39 and 40, with the same force and effect as if set forth herein at length.

42. Section 2, Article III of the 1968 Amendment to GAC 50 required Hancock to redetermine each year the Liabilities of the Fund.

43. Section 2, Article III of the 1968 Amendment to GAC 50 also required that the 1968 rate basis and tables be reconsidered annually and be amended from time to time in the application of sound actuarial principles for the annual determination of the Liabilities of the Fund since it provided for Hancock reaching agreement with Sperry Trust with respect to changes in the 1968 rate basis and tables.

44. Hancock was acting as actuary for Sperry Trust under GAC 50 in establishing the 1968 rate basis and tables for determining the Liabilities of the Fund under the 1968 Amendment and thereafter in continuing to apply the 1968 rate basis and tables which caused, without Sperry Trust's knowledge or consent, the growth of excess funds not required for benefits to eligible employees.

45. Hancock has continued to use the 1968 rate basis and tables in breach of its contractual obligations to redetermine annually the Liabilities of the Fund and to reach agreement with Sperry Trust on changing the rate basis and tables upon which the Liabilities of the Fund were to be determined.

46. As a result of the foregoing breach of GAC 50 by Hancock, the amount of the Liabilities of the Fund (and the amount required to be maintained in the Pension Administration Fund) has been miscalculated and grossly overstated by Hancock, to the damage of Sperry Trust in an amount to be determined at trial.

THIRD CAUSE OF ACTION

47. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40 and 42 through 46, with the same force and effect as if set forth herein at length.

48. Sperry Trust has protested to Hancock its application of the 1968 rate basis and tables in Hancock's determination of the Liabilities of the Fund and has sought agreement with Hancock on the use of a rate basis and tables consistent with sound actuarial principles.

49. Hancock has failed and refused to change the 1968 rate basis and tables consistent with sound actuarial principles and has failed and refused to make any change without Hancock's unilateral imposition of numerous charges and conditions entirely unrelated to the applicability of the 1968 rate basis and tables.

50. As a result of the foregoing, Hancock has breached GAC 50 to the damage of Sperry Trust in an amount to be determined at trial.

FOURTH CAUSE OF ACTION

51. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46 and 48 through 50, with the same force and effect as if set forth herein at length.

52. Hancock was engaged by Sperry Trust to act as an actuary, and Hancock did act as Sperry Trust's actuary (and was paid therefor) in connection with GAC 50 including the 1968

Amendment, the 1968 rate basis and tables and the continuing use thereof.

53. As actuary for Sperry Trust, Hancock owed Sperry Trust continuing duties of utmost care and loyalty and continuing exercise of its actuarial expertise in accordance with sound actuarial principles and professional standards required of actuaries.

54. Sperry Trust relied upon Hancock as actuary in connection with the 1968 Amendment and thereafter.

55. At the time of the 1968 Amendment and thereafter, Hancock as actuary breached its duties and obligations to Sperry Trust in failing to apply sound actuarial standards and failing to meet professional standards of conduct and competence applicable to Hancock as Sperry Trust's actuary, including Hancock's failure as an actuary to properly inform, advise and counsel Sperry Trust in 1968 and in each year thereafter with respect to the 1968 Amendment, the 1968 rate basis and tables and related matters. Hancock's conduct as actuary for Sperry Trust constituted professional misconduct and malpractice, to the damage of Sperry Trust in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

56. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, and 52 through 55, with the same force and effect as if set forth herein at length.

57. In connection with GAC 50, Hancock knowingly was acting as actuary and as an insurance carrier and pension consultant for Sperry Trust with unique knowledge and expertise. As a result, Hancock had a fiduciary and confidential relationship with Sperry Trust.

58. In connection with GAC 50, Hancock violated its fiduciary and confidential obligations to Sperry Trust by, among other

things, improperly retaining and continuing to accumulate and retain excess funds in the Pension Administration Fund and as a result Sperry Trust is entitled to the turn over by Hancock of an amount to be determined at trial.

SIXTH CAUSE OF ACTION

59. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55 and 57 and 58, with the same force and effect as if set forth herein at length.

60. Hancock has breached its contractual obligations and violated its confidential and fiduciary relationship with Sperry Trust.

61. Future performance of GAC 50 requires that a confidential and fiduciary relationship exist and continue to exist on the part of Hancock with Sperry Trust.

62. As a result of the foregoing, GAC 50 cannot continue and should be declared null and void and of no force and effect and all monies credited by Hancock to the Pension Administration Fund should be returned to Sperry Trust without purchase of annuities, imposition of any asset liquidation adjustment or other charges.

SEVENTH CAUSE OF ACTION

63. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58 and 60 through 62, with the same force and effect as if set forth herein at length.

64. Hancock concealed from Sperry Trust the consequences arising from the 1968 Amendment and the utilization of the 1968 rate basis and tables.

65. As a result of the foregoing Sperry Trust has been damaged in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION

66. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58, 60 through 62, 64 and 65, with the same force and effect as if set forth herein at length.

67. Hancock has breached GAC 50 by improperly accumulating and retaining excess funds in the Pension Administration Fund and by refusing to turn over all of such funds to Sperry Trust, to the damage of Sperry Trust in an amount to be determined at trial.

NINTH CAUSE OF ACTION

68. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58, 60 through 62, 64, 65 and 67, with the same force and effect as if set forth herein at length.

69. Hancock has been and will continue to be unjustly enriched by improperly retaining and continuing to accumulate and retain excess funds in the Pension Administration Fund, to the damage of Sperry Trust in an amount to be determined at trial.

TENTH CAUSE OF ACTION

70. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58, 60 through 62, 64, 65, 67 and 69, with the same force and effect as if set forth herein at length.

71. Hancock has not returned excess funds in 1968 and each year thereafter and has refused to return excess funds in the Pension Administration Fund to Sperry Trust without imposition of an asset liquidation adjustment arbitrary in amount and in contravention of the 1968 Amendment.

72. As a result of the foregoing, Hancock has breached GAC 50 and Sperry Trust has been damaged in an amount to be determined at trial.

ELEVENTH CAUSE OF ACTION

73. Plaintiff repeats and realleges paragraph 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58, 60 through 62, 64, 65, 67, 69, 71 and 72, with the same force and effect as if set forth herein at length.

74. By reason of Hancock's position as actuary, pension advisor and insurance carrier, with unique knowledge and expertise, and its relationship with Sperry Trust, Hancock presented the 1968 Amendment and the 1966 rate basis and tables to Sperry Trust in a manner precluding meaningful negotiation and opportunity to revise and amend the terms and conditions of the 1968 Amendment. As a result, Hancock foisted upon Sperry Trust inequitable and unconscionable provisions of the 1968 Amendment which are against public policy and inimical to the interests of Sperry Trust and eligible employees.

75. As a result of the foregoing, Sperry Trust has been damaged in an amount to be determined at trial.

TWELFTH CAUSE OF ACTION

76. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58, 60 through 62, 64, 65, 67, 69, 71, 72, 74 and 75, with the same force and effect as if set forth herein at length.

77. To the extent that an adequate remedy at law is not available to Sperry Trust, the 1968 Amendment should be reformed (i) to require proper annual calculations of the Liabilities of the Fund, (ii) to prevent Hancock's retention and further accumulation and retention of excess funds in the Pension Administration Fund and (iii) to prevent Hancock's imposition of unwarranted asset liquidation adjustments or other charges.

THIRTEENTH CAUSE OF ACTION

78. Plaintiff repeats and realleges paragraphs 1 through 37, 39, 40, 42 through 46, 48 through 50, 52 through 55, 57, 58, 60 through 62, 64, 65, 67, 69, 71, 72, 74, 75 and 77, with the same force and effect as if set forth herein at length.

79. Under GAC 50, including the 1968 Amendment and other amendments thereto, Hancock was and is obligated to act in good faith and deal fairly with Sperry Trust, not subordinate Sperry Trust's interests to its own interests, exercise diligence, good faith and conscientious fidelity in safeguarding Sperry Trust's interests, deal ethically with Sperry Trust, fairly and adequately inform Sperry Trust of the nature and scope of GAC 50, the 1968 Amendment and other amendments, not breach GAC 50, the 1968 Amendment and other amendments and not engage in bad faith practices or conduct.

80. Hancock's breaches of GAC 50, the 1968 Amendment and other amendments and Hancock's wrongful conduct, all as hereinabove alleged, in each case constitute separate bad faith, wrongful, wanton, malicious and fraudulent breaches.

81. As a result of the foregoing, Sperry Trust has been damaged and will continue to suffer damages in an amount to be determined at trial and, in addition to compensatory damages, Sperry Trust is entitled to recover punitive damages from Hancock.

WHEREFORE, Plaintiff demands judgment against Hancock as follows:

I. On the first cause of action:

(A) that Hancock (i) pay all non-guaranteed benefits due and owing as of trial and (ii) pay as punitive damages twice the amount of such non-guaranteed benefits; and

(B) directing Hancock to pay all non-guaranteed benefits designated to be paid under the Plan after trial.

The payment of benefits in accordance with (A) and (B) above to be derived from all funds in the Pension Administration Fund in excess of the Liabilities of the Fund to be calculated (1) utilizing rate tables consistent with and in accordance with sound actuarial principles; or (2) utilizing the case rate used by Hancock for the Pension Administration Fund; or (3) utilizing the 1968 Amendment Hancock rate tables.

II. On each of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes of action, that Hancock:

(A) transfer and payover to Sperry Trust all funds in the Pension Administration Fund as of the trial; or in the alternative,

(B) transfer and payover to Sperry Trust all funds in the Pension Administration Fund in excess of the Liabilities of the Fund as of the trial, such Liabilities of the Fund to be calculated (1) utilizing rate tables consistent with and in accordance with sound actuarial principles, or, in the alternative (2) utilizing the case rate used by Hancock for the Pension Administration Fund.

The transfer and payment in accordance with (A) or (B) above to be with no reduction or diminution in amount for asset liquidation adjustments or any other charges.

III. On each of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth causes of action, that Hancock pay to Sperry Trust damages in an amount to be determined at trial.

IV. On the Twelfth Cause of Action, that GAC 50 and the 1968 Amendment be reformed with provisions (i) to require proper annual calculations of the Liabilities of the Fund, (ii) to prevent the retention, and further accumulation and retention, by Hancock of excess funds in the Pension Administration Fund and (iii) to prevent the imposition by Hancock of unwarranted asset liquidation adjustments or other charges.

V. On the Thirteenth Cause of Action, that Hancock pay Sperry Trust (in addition to the compensatory damages and other relief previously demanded) as punitive damages an amount equal to not less than the amount presently in the Pension Administration Fund.

VI. On each of all of the Causes of Action, that Hancock pay Sperry Trust interest, and costs and disbursements including attorneys' fees.

VII. Such further and other relief as this Court deems just and proper.

Dated: New York, New York
July 20, 1983

ANDERSON RUSSELL KILL & OLICK, P.C.

By /s/ Lawrence Kill
Lawrence Kill

By /s/ Richard W Collins
Richard W. Collins

Members of the Firm
Attorneys for Plaintiff
666 Third Avenue
New York, New York 10017
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Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHASE MANHATTAN BANK, N.A. as Trustee of the Sperry Master Retirement Trust No. 2,	:	Civil Action No.
Plaintiff,	:	Docket No. 83 Civ.5401 (JFK)
-against-	:	
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,	:	
Defendant.	:	**AMENDED COMPLAINT**

Plaintiff, by its attorneys Anderson Russell Kill & Olick, P.C., for its complaint herein alleges:

THE PARTIES

1. The plaintiff Chase Manhattan Bank, N.A. ("Chase") is a corporation organized and existing under the laws of the United States and has its principal office in New York, New York. Pursuant to an agreement dated October 1, 1976 and effective May 1, 1978, Chase became and has continued to act as the trustee for the Sperry Master Retirement Trust No. 2 which was established for the benefit of employees of Sperry Corporation and its participating subsidiary companies (plaintiff herein is sometimes referred to as "Sperry Trust" and "Sperry Trust" hereafter shall mean Sperry Corporation before May 1, 1978 and Chase after May 1, 1978). The Sperry Master Retirement Trust No. 2 at all times has been located in the State of New York. Sperry Corporation is organized and existing under the laws of the State of Delaware and has its principal office in New York, New York.

2. Defendant John Hancock Mutual Life Insurance Company ("Hancock") is a Massachusetts corporation having its principal place of business in Boston, Massachusetts. Hancock is licensed,

is doing business and has offices within the State of New York. Hancock has acted and continues to act in respect of matters in issue in this complaint as a pension expert, pension advisor, pension designer, insurance carrier, investment manager and advisor, actuary, party in interest and fiduciary.

THIS ACTION AND JURISDICTION

3. This action involves breaches by Hancock of its duties and obligations as a party in interest and a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, et seq. ("ERISA"), and breaches of contract and misconduct on the part of Hancock in connection with a group annuity pension contract under which Hancock holds approximately $120 million as of the date of the complaint herein to provide retirement benefits to Sperry Corporation employees eligible under the Sperry Retirement Program to receive such benefits ("eligible employees"). A substantial and material portion of such amount has been and is unnecessary to provide such benefits and has been wrongfully accumulated and retained by Hancock to the detriment and damage of Sperry Trust, the Sperry Retirement Program and eligible employees.

4. This action involves citizens of different states and exceeds, exclusive of interest and costs, the sum of ten thousand dollars ($10,000). Jurisdiction of this Court is based upon 28 U.S.C. § 1332. This action also involves breaches, violations and failures by Hancock in violation of ERISA, and jurisdiction is based upon 28 U.S.C § 1331 and 29 U.S.C. § 1132.

FACTUAL BACKGROUND

A. The 1941 Group Annuity Contract

5. In 1941, Sperry Corporation entered into a Group Annuity Contract, No. 50 GAC ("GAC 50"), with Hancock to provide for the purchase of deferred annuities payable to Sperry Corporation employees upon retirement funded by contributions of Sperry Corporation eligible employees and of Sperry

Corporation in accordance with rate tables prepared by Hancock and annexed to GAC 50. Effective May 1, 1978, Chase, as Trustee under the Sperry Master Retirement Trust No. 2, was substituted for Sperry Corporation as the GAC 50 contract holder.

B. The 1968 Amendment

6. GAC 50 was amended effective January 1, 1968 (the "1968 Amendment"). The 1968 Amendment was drafted, prepared and submitted to Sperry Trust by Hancock. The 1968 Amendment provided for cancelling deferred annuities purchased for Sperry Corporation employees and placing the resulting funds in a Pension Administration Fund.

7. The Pension Administration Fund was established under the 1968 Amendment to provide funds to pay benefits to eligible employees of the Sperry Retirement Program ("Sperry Retirement Program" is defined in the 1968 Amendment as "Plan" which term will be used hereafter). The amount in the Pension Administration Fund was required to be maintained at a level sufficient to purchase annuities to provide benefits to all Sperry Corporation eligible employees. The amount so required to be in the Pension Administration Fund under the 1968 Amendment was to be not less than an amount determined annually by Hancock. That annual amount was not to be less than the "Liabilities of the Fund."

8. The Liabilities of the Fund to be determined by Hancock each year under the 1968 Amendment were the aggregate of (i) the amount necessary to purchase annuities that had been cancelled on January 1, 1968, (ii) the amount necessary to purchase annuities (in addition to annuities covered by (i)) for eligible employees who had retired during each year after 1967 and (iii) a contingency reserve. Under the 1968 Amendment, the annual amount required to be in the Pension Administration Fund was to equal 100% of the Liabilities of the Fund. The 1968 Amendment also provided for the existence of a Supplemental Fund (known as Separate Investment Account No. 18 from June

30, 1976 to August 1, 1979) at the option of Sperry Trust. In the event such Fund in fact was established and existed, the annual amount required to be in the Pension Administration Fund and the Supplemental Fund was to be 105% of the Liabilities of the Fund.

9. The major component of the Liabilities of the Fund was the amount that would be necessary to purchase annuities. That amount was determined by Hancock utilizing rate tables which were prepared by Hancock in 1968. These rate tables incorporated interest factors determined solely by Hancock. At the time of Sperry Trust's entry into the 1968 Amendment and thereafter and in determining the rate tables to be used in 1968 and thereafter, Hancock acted for Sperry Trust as a fiduciary and an actuary and also utilized its unique expertise and knowledge as pension expert, pension advisor, pension designer, insurance carrier and investment manager.

10. Under the 1968 Amendment, in any year the Pension Administration Fund did not equal the Liabilities of the Fund (or 105% thereof if a Supplemental Fund existed) as annually determined solely by Hancock, Sperry Trust would be required to contribute an amount so that the Pension Administration Fund would be at the required level. If Sperry Trust failed to make such a required contribution, Hancock was empowered to terminate GAC 50 and to retain for itself amounts in GAC 50 including amounts in excess of the Liabilities of the Fund, contingency reserve amounts and amounts that would result from Hancock's actual purchase of annuities at costs substantially below the annuities' costs used to calculate the Liabilities of the Fund.

C. The 1977 Amendment

11. Effective August 1, 1977, Sperry Trust and Hancock amended GAC 50 (hereinafter the "1977 Amendment"). As a result of the 1977 Amendment, the Liabilities of the Fund were limited to the amount necessary to purchase annuities cancelled

on January 1, 1968 and an amount necessary to purchase annuities in excess of those cancelled on January 1, 1968 for eligible employees who retired between January 1, 1968 and the August 1, 1977 Amendment. As a consequence, the number of employees and their entitlement to retirement benefits under GAC 50 were fixed as to the amount required to be used to calculate the Liabilities of the Fund. The 1977 Amendment also provided a means for Sperry Trust to pay additional benefits through GAC 50 on a current basis to eligible employees by defining into two categories the benefits to be provided under GAC 50: (a) guaranteed benefits, and (b) non-guaranteed benefits. Guaranteed benefits are benefits under the Plan covered in the Liabilities of the Fund. Non-guaranteed benefits are all benefits (other than guaranteed benefits) to be paid to retired employees of Sperry Corporation pursuant to the Plan. The 1977 Amendment specifically provided that Sperry Trust could provide non-guaranteed benefits from any monies in the Pension Administration Fund in excess of the amount calculated as the Liabilities of the Fund. At all times since the 1977 Amendment, as Hancock has acknowledged, the Pension Administration Fund has been more than sufficient to cover payments of non-guaranteed benefits designated under the Plan.

D. Hancock Payments of Non-guaranteed Benefits

12. Pursuant to the 1977 Amendment, Hancock had been paying, on a monthly basis, non-guaranteed benefits from Pension Administration Fund excess funds to retired employees designated under the Plan.

13. On March 24, 1982, the Plan was amended to include within the categories of eligible employees covered by GAC 50, retired employees of the Univac Division of Sperry Corporation.

14. By letter dated April 27, 1982, Hancock was informed that non-guaranteed benefits were to be paid to retired employees of the Univac Division with a Benefit Commencement Date of May 1, 1982.

15. By letter dated May 14, 1982, Hancock refused to pay the non-guaranteed benefits to the retired employees of Sperry Corporation's Univac Division. In the same letter, Hancock agreed to continue the non-guaranteed benefit payments that it had been making prior to May 1982.

16. By letter dated May 24, 1982, Sperry informed Hancock that it considered Hancock's failure to pay the non-guaranteed benefits called for in Sperry's April 27, 1982 letter to Hancock to be a material breach of GAC 50 and again demanded payment of all non-guaranteed benefits.

17. By letter dated May 25, 1982, Sperry demanded payment of non-guaranteed benefits for June 1982.

18. By check dated May 26, 1982, and delivered to Sperry on May 27, 1982, Hancock paid all non-guaranteed benefits for May and June 1982.

19. By letter dated May 27, 1982, Hancock informed Sperry that it would cease making payments of all non-guaranteed benefits, including non-guaranteed benefits that Hancock had been paying since the effective date of the 1977 Amendment.

20. By letter dated June 2, 1982, Sperry demanded that Hancock continue to pay non-guaranteed benefits.

21. By letter dated June 14, 1982, Hancock reiterated its refusal to pay non-guaranteed benefits then or in the future.

22. After June 1982, Hancock has failed to make payments of any non-guaranteed benefits.

23. At all relevant times the excess funds in the Pension Administration Fund have been and continue to be sufficient in amount to provide the non-guaranteed benefits demanded by Sperry Trust which Hancock has refused to pay.

E. Excess Funds Retained by Hancock Under GAC 50

24. The amount of excess funds in the Pension Administration Fund under GAC 50 is dependent upon the proper calculation of the Liabilities of the Fund.

25. The method employed by Hancock each year to determine the Liabilities of the Fund has been to utilize rate tables it established in 1968 as part of the 1968 Amendment. Upon information and belief, Hancock's rate tables use interest rates of between 2-1/2% and 3% and those interest rates have never been changed by Hancock and have been determined by Hancock every year since the 1968 Amendment in Hancock's annual determination of the Liabilities of the Fund.

26. Under the 1968 Amendment, Hancock adjusts the Pension Administration Fund (i) by deducting administrative and operational expenses and (ii) by adding actual net interest earned (less no more than 1%) on assets attributable to the Pension Administration Fund. Hancock refers to the rate basis for its calculation of such net interest as the "case rate."

27. At all times since at least the 1977 Amendment, the Pension Administration Fund (including the annual case rate additions) has been substantially and increasingly greater than the Liabilities of the Fund as annually determined by Hancock with the result that Hancock in contravention of the 1968 and 1977 Amendments and its fiduciary obligations has each year continued to accumulate and retain excess funds in the Pension Administration Fund.

28. Hancock has admitted that as of January 1, 1982 there was approximately $20 million excess in the Pension Administration Fund utilizing the 1968 rate tables' 2-1/2% to 3% interest factor in Hancock's calculation of the Liabilities of the Fund.

29. If Hancock's case rate interest factor (applied by Hancock for actual interest added to the Pension Administration Fund) is applied in determining the Liabilities of the Fund, the

excess in the Pension Administration Fund would increase from the $20 million excess admitted by Hancock to approximately $60 million.

30. If a current interest rate factor is applied in determining the Liabilities of the Fund, the excess in the Pension Administration Fund would increase from the $20 million excess admitted by Hancock to approximately $75 million.

31. Sperry Trust has demanded return of the excess funds in the Pension Administration Fund.

32. Hancock has refused to return the excess funds as demanded by Sperry Trust. During 1982 Hancock had been willing to return some of the excess funds, but only after first imposing numerous conditions, including various charges such as an asset liquidation adjustment and additional risk charges, and then only over a period of five years.

F. Asset Liquidation Adjustment

33. The 1968 Amendment (Article III, Section 9 of GAC 50) provides for the transfer to Sperry Trust of the amount equal to the excess in the Pension Administration Fund over the amount of the Liabilities of the Fund. Under the 1968 Amendment, the transfer is to be the full amount of such excess, except in the limited circumstance set forth in the 1968 Amendment where it would be necessary for Hancock to liquidate investments to provide the excess amount to be transferred. Under the 1968 Amendment, adjustment of the amount to be transferred (either an increase for gains or a decrease for losses) would arise and be applicable only if liquidation of Hancock's investments was necessary and actually occurred to provide the excess amount to be transferred. The adjustment is termed an "Asset Liquidation Adjustment" in the 1968 Amendment. On information and belief, since the 1968 Amendment Hancock each year has had on hand and available amounts sufficient to transfer to Sperry Trust the excess in the Pension Administration Fund without any necessity for Hancock to liquidate investments to provide the excess amount transferrable to Sperry Trust.

34. Hancock has stated that an asset liquidation adjustment is necessary despite the availability of funds to pay transfers, in order to allow Hancock to adjust the values carried on Hancock's books for assets (e.g., face amount of bonds) to actual market values at the time of any transfer of funds from the Pension Administration Fund. This Hancock adjustment, in addition to ignoring the availability of funds to pay transfers, disregards (i) Hancock assets that matured each year at full book values, (ii) Hancock reinvestment of assets at current interest rates and (iii) Hancock's ability and obligation to transfer excess funds each year to Sperry Trust.

G. Hancock's Confidential and Fiduciary Relationship with Sperry Trust

35. As a result of Hancock's unique expertise and knowledge as a pension expert, pension advisor, pension designer, insurance carrier and investment manager, and Hancock's being and having acted as a party in interest, fiduciary and actuary for Sperry Trust, Hancock had and has a confidential and fiduciary relationship with Sperry Trust with duties and obligations to Sperry Trust arising from such relationship with respect to GAC 50 and in particular the 1968 Amendment, the 1977 Amendment, the annual determinations of the Liabilities of the Fund and the existence, amount and use of excess funds in the Pension Administration Fund.

36. Sperry Trust relied upon the representations, disclosures and actions of Hancock in connection with GAC 50.

H. Sperry Trust's Performance of Obligations

37. Sperry Trust has performed all its obligations under GAC 50.

FIRST CAUSE OF ACTION

38. Plaintiff repeats and realleges paragraphs 1 through 37, with the same force and effect as if set forth herein at length.

39. Hancock has been and continues to be a fiduciary with respect to GAC 50 under and within the terms of 29 U.S.C §1002(21)(A) and a party in interest under and within the terms of 29 U.S.C. §1002(14), in that (i) Hancock continuously has exercised authority or control respecting management and disposition of Plan assets, (ii) Hancock continuously has rendered investment advice in exchange for remuneration with respect to Plan assets, and continuously has had authority or responsibility to render investment advice, and (iii) Hancock continuously has provided services with respect to the Plan.

40. Hancock continuously has acted to the detriment of the Plan, Plan assets and eligible employees, by failing to discharge its duties as a party in interest and its fiduciary duties mandated by 29 U.S.C. §1104(a)(2), and by engaging in acts and practices constituting transactions prohibited by 29 U.S.C. §1106(b), in that Hancock continuously (i) has failed to act for the exclusive purpose of providing benefits to the Plan's eligible employees and by imposing unreasonable charges, (ii) has failed to act with the care, skill, prudence and diligence that a prudent person acting as a fiduciary familiar with Plan matters would use in conducting an enterprise of a like character and with like aims, and (iii) has improperly dealt with Plan assets in its own interest or for its own account, and has overcompensated itself, by reason of:

(a) Hancock's failure and refusal to pay non-guaranteed benefits to eligible employees;

(b) Hancock's failure and refusal to amend the 1968 rate basis and tables to reflect changing conditions and to revise the terms of the 1968 Amendment to remove inequitable and unconscionable provisions detrimental to the Plan, Plan assets and eligible employees;

(c) Hancock's failure and refusal to apply sound actuarial principles for the annual determination of the Liabilities of the Fund;

(d) Hancock's gross miscalculation and overstatement of the Liabilities of the Fund;

(e) Hancock's improper accumulation and retention of funds in the Pension Administration Fund in excess of (x) the overstated Liabilities of the Fund, (y) the Liabilities of the Fund utilizing Hancock's case rate interest factor, and (z) the Liabilities of the Fund utilizing a current interest rate factor;

(f) Hancock's failure and refusal to return excess funds;

(g) Hancock's improper attempts to impose upon the return of any excess funds numerous conditions including various improper charges such as an asset liquidation adjustment, alleged risk charges and payment over time;

(h) Hancock's arbitrary calculation and determination of the amount of any asset liquidation adjustment;

(i) Hancock's failure to disclose and its concealment of the adverse consequences of its policies and practices including its establishment and continued use of the 1968 rate basis and tables;

(j) Hancock's failure and refusal to act with utmost care and loyalty and to apply sound actuarial principles and professional standards required of Hancock as actuary;

(k) Hancock's investment practices with respect to the Pension Administration Fund detrimental the interests of the Plan, Plan assets and eligible employees;

(l) Hancock's failure and refusal to utilize the declining balance method to calculate investment

status and results attributable to the Pension Administration Fund;

(m) Hancock's failure and refusal, in violation of its duties and obligations under GAC 50 as amended and under ERISA, to properly calculate and determine divisible surplus and to provide immediate participation and the proper amount of dividends;

(n) Hancock's improper practices and policies in arbitrarily establishing classes of contracts and in discriminatorily administering GAC 50 as a part of a class of contracts;

(o) Hancock's violations of its duties and obligations as pension expert, pension advisor, pension plan designer, actuary, insurance carrier and investment manager in respect of Hancock's breaches, violations and failures to discharge its duties under ERISA, as aforesaid; and

(p) Hancock's failure and refusal to return all funds comprising the Pension Administration Fund after demand for such return was made upon Hancock and such demand was based upon Hancock's breaches, violations and failures to discharge its duties under ERISA.

41. As a result of Hancock's breaches, violations and failures to discharge its duties under ERISA, as aforesaid, Sperry Trust on its behalf and on behalf of the Plan and eligible employees has been damaged in an amount to be determined at trial and pursuant to 29 U.S.C. § 1109 Sperry Trust is entitled to the recovery of damages and attorneys' fees, and to such equitable or remedial relief as this Court deems appropriate.

SECOND CAUSE OF ACTION

42. Plaintiff repeats and realleges paragraphs 1 through 37 and 39 through 41, with the same force and effect as if set forth herein at length.

43. Hancock has breached GAC 50 by failing to pay non-guaranteed benefits and by refusing to pay non-guaranteed benefits in the future.

44. As a result of Hancock's breach of GAC 50, Sperry Trust has been damaged and will continue to be damaged in an amount in excess of $1,200,000 per month, the exact amount of the aggregate damage to be determined at trial. Since Hancock's refusal to pay non-guaranteed benefits was and continues to be wrongful, wanton, malicious and fraudulent in violation of the rights and entitlements of plaintiff and its numerous eligible employees, all contrary to public policy, plaintiff is entitled to an award of punitive damages in an amount not less than twice the aggregate damage to be determined at trial.

THIRD CAUSE OF ACTION

45. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41 and 43 and 44, with the same force and effect as if set forth herein at length.

46. Section 2, Article III of the 1968 Amendment to GAC 50 required Hancock to redetermine each year the Liabilities of the Fund.

47. Section 2, Article III of the 1968 Amendment to GAC 50 also required that the 1968 rate basis and tables be reconsidered annually and be amended from time to time in the application of sound actuarial principles for the annual determination of the Liabilities of the Fund since it provided for Hancock reaching agreement with Sperry Trust with respect to changes in the 1968 rate basis and tables.

48. Hancock was acting as pension expert, pension advisor, pension designer, insurance carrier, investment manager, actuary, party in interest and fiduciary for Sperry Trust, the Plan, Plan assets and eligible employees in establishing the 1968 rate basis and tables for determining the Liabilities of the Fund under the 1968 Amendment and thereafter in continuing to apply the

1968 rate basis and tables which caused, without Sperry Trust's knowledge or consent, the growth of excess funds not required for benefits to eligible employees.

49. Hancock has continued to use the 1968 rate basis and tables in breach of its contractual obligations to redetermine annually the Liabilities of the Fund and to reach agreement with Sperry Trust on changing the rate basis and tables upon which the Liabilities of the Fund were to be determined.

50. As a result of the foregoing breach of GAC 50 by Hancock, the amount of the Liabilities of the Fund (and the amount required to be maintained in the Pension Administration Fund) has been miscalculated and grossly overstated by Hancock, to the damage of Sperry Trust in an amount to be determined at trial.

FOURTH CAUSE OF ACTION

51. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, with the same force and effect as if set forth herein at length.

52. Sperry Trust has protested to Hancock its application of the 1968 rate basis and tables in Hancock's determination of the Liabilities of the Fund and has sought agreement with Hancock on the use of a rate basis and tables consistent with sound actuarial principles.

53. Hancock has failed and refused to change the 1968 rate basis and tables consistent with sound actuarial principles and has failed and refused to make any change without Hancock's unilateral imposition of numerous charges and conditions entirely unrelated to the applicability of the 1968 rate basis and tables.

54. As a result of the foregoing, Hancock has breached GAC 50 to the damage of Sperry Trust in an amount to be determined at trial.

FIFTH CAUSE OF ACTION

55. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50 and 52 through 54, with the same force and effect as if set forth herein at length.

56. Hancock was engaged by Sperry Trust to act as actuary, and Hancock did act as Sperry Trust's actuary (and was paid therefor) in connection with GAC 50 including the 1968 Amendment, the 1968 rate basis and tables and the continuing use thereof.

57. As actuary for Sperry Trust, Hancock owed Sperry Trust continuing duties of utmost care and loyalty and continuing exercise of its actuarial expertise in accordance with sound actuarial principles and professional standards required of actuaries.

58. Sperry Trust relied upon Hancock as actuary in connection with the 1968 Amendment and thereafter.

59. At the time of the 1968 Amendment and thereafter, Hancock as actuary breached its duties and obligations to Sperry Trust in failing to apply sound actuarial standards and failing to meet professional standards of conduct and competence applicable to Hancock as Sperry Trust's actuary, including Hancock's failure as an actuary to properly inform, advise and counsel Sperry Trust in 1968 and in each year thereafter with respect to the 1968 Amendment, the 1968 rate basis and tables and related matters. Hancock's conduct as actuary for Sperry Trust constituted professional misconduct and malpractice, to the damage of Sperry Trust in an amount to be determined at trial.

SIXTH CAUSE OF ACTION

60. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, and 56 through 59, with the same force and effect as if set forth herein at length.

61. In connection with GAC 50, Hancock knowingly was acting as pension expert, pension advisor, pension designer, insurance carrier, investment manager, actuary, and party in interest for Sperry Trust with unique knowledge and expertise. As a result, Hancock had a fiduciary and confidential relationship with Sperry Trust.

62. In connection with GAC 50, Hancock violated its fiduciary and confidential obligations to Sperry Trust by, among other things, improperly retaining and continuing to accumulate and retain excess funds in the Pension Administration Fund and as a result Sperry Trust is entitled to the turn over by Hancock of an amount to be determined at trial.

SEVENTH CAUSE OF ACTION

63. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56 through 59, 61 and 62, with the same force and effect as if set forth herein at length.

64. Hancock has breached its contractual obligations and violated its confidential and fiduciary relationship with Sperry Trust.

65. Future performance of GAC 50 requires that a confidential and fiduciary relationship exist and continue to exist on the part of Hancock with Sperry Trust.

66. As a result of the foregoing, GAC 50 cannot continue and should be declared null and void and of no force and effect and all monies credited by Hancock to the Pension Administration Fund should be returned to Sperry Trust without purchase of annuities, imposition of any asset liquidation adjustment or other charges.

EIGHTH CAUSE OF ACTION

67. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56

through 59, 61 and 62, and 64 through 66, with the same force and effect as if set forth herein at length.

68. Hancock concealed from Sperry Trust the consequences arising from the 1968 Amendment and the utilization of the 1968 rate basis and tables.

69. As a result of the foregoing Sperry Trust has been damaged in an amount to be determined at trial.

NINTH CAUSE OF ACTION

70. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56 through 59, 61 and 62, 64 through 66, 68 and 69, with the same force and effect as if set forth herein at length.

71. Hancock has breached GAC 50 by improperly accumulating and retaining excess funds in the Pension Administration Fund and by refusing to turn over all of such funds to Sperry Trust, to the damage of Sperry Trust in an amount to be determined at trial.

TENTH CAUSE OF ACTION

72. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56 through 59, 61 and 62, 64 through 66, 68 and 69, and 71, with the same force and effect as if set forth herein at length.

73. Hancock has been and will continue to be unjustly enriched by improperly retaining and continuing to accumulate and retain excess funds in the Pension Administration Fund, to the damage of Sperry Trust in an amount to be determined at trial.

ELEVENTH CAUSE OF ACTION

74. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56

through 59, 61 and 62, 64 through 66, 68 and 69, 71, and 73, with the same force and effect as if set forth herein at length.

75. Hancock has not returned excess funds in 1968 and each year thereafter and has refused to return excess funds in the Pension Administration Fund to Sperry Trust without imposition of an asset liquidation adjustment arbitrary in amount and in contravention of the 1968 Amendment.

76. As a result of the foregoing, Hancock has breached GAC 50 and Sperry Trust has been damaged in an amount to be determined at trial.

TWELFTH CAUSE OF ACTION

77. Plaintiff repeats and realleges paragraph 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56 through 59, 61 and 62, 64 through 66, 68 and 69, 71, 73, 75 and 76 with the same force and effect as if set forth herein at length.

78. By reason of Hancock's position as pension expert, pension advisor, pension designer, insurance carrier, investment manager, actuary, party in interest and fiduciary, with unique knowledge and expertise, and its relationship with Sperry Trust, Hancock presented the 1968 Amendment and the 1968 rate basis and tables to Sperry Trust in a manner precluding meaningful negotiation and opportunity to revise and amend the terms and conditions of the 1968 Amendment. As a result, Hancock foisted upon Sperry Trust and has continued to use inequitable and unconscionable provisions of the 1968 Amendment which are against public policy and inimical to the interests of Sperry Trust and eligible employees.

79. As a result of the foregoing, Sperry Trust has been damaged in an amount to be determined at trial.

THIRTEENTH CAUSE OF ACTION

80. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56 through 59, 61 and 62, 64 through 66, 68 and 69, 71 and 73, 75 and 76, 78 and 79, with the same force and effect as if set forth herein at length.

81. To the extent that an adequate remedy at law is not available to Sperry Trust, the 1968 Amendment should be reformed (i) to require proper annual calculations of the Liabilities of the Fund, (ii) to prevent Hancock's retention and further accumulation and retention of excess funds in the Pension Administration Fund and (iii) to prevent Hancock's imposition of unwarranted asset liquidation adjustments or other charges.

FOURTEENTH CAUSE OF ACTION

82. Plaintiff repeats and realleges paragraphs 1 through 37, 39 through 41, 43 and 44, 46 through 50, 52 through 54, 56 through 59, 61 and 62, 64 through 66, 68 and 69, 71 and 73, 75 and 76, 78 and 79, and 81, with the same force and effect as if set forth herein at length.

83. Under GAC 50, including the 1968 Amendment and other amendments hereto, Hancock was and is obligated to act in good faith and deal fairly with Sperry Trust, not subordinate Sperry Trust's interests to its own interests, exercise diligence, good faith and conscientious fidelity in safeguarding Sperry Trust's interests, deal ethically with Sperry Trust, fairly and adequately inform Sperry Trust of the nature and scope of GAC 50, the 1968 Amendment and other amendments, not breach GAC 50, the 1968 Amendment and other amendments and not engage in bad faith practices or conduct.

84. Hancock's breaches of GAC 50, the 1968 Amendment and other amendments and Hancock's wrongful conduct, all as

hereinabove alleged, in each case constitute separate bad faith, wrongful, wanton, malicious and fraudulent breaches.

85. As a result of the foregoing, Sperry Trust has been damaged and will continue to suffer damages in an amount to be determined at trial and, in addition to compensatory damages, Sperry Trust is entitled to recover punitive damages from Hancock.

WHEREFORE, Plaintiff demands judgment against Hancock as follows:

I. On the first cause of action:

(A) that Hancock pay to Sperry Trust damages, including but not limited to payment of all non-guaranteed benefits withheld by Hancock and return of all excess funds withheld by Hancock without reduction or diminution in amount for asset liquidation adjustments or any other charges, in an amount to be determined at trial;

(B) that Hancock pay to Sperry Trust all losses to Sperry Trust and the Plan resulting from each of Hancock's breaches of its responsibilities, obligations or duties imposed upon Hancock as a party in interest and a fiduciary under ERISA, in an amount to be determined at trial;

(C) that Hancock pay to Sperry Trust all Hancock profits made through its use of Plan assets, in an amount to be determined at trial;

(D) that Hancock transfer and pay over to Sperry Trust all funds in the Pension Administration Fund without the purchase of annuities and without reduction or diminution in amount for asset liquidation adjustments or any other charges;

(E) that GAC 50 and the 1968 Amendment be reformed to include, without limitation, provisions (i) to require proper annual calculations of the Liabilities of the Fund, (ii) to prevent the retention, and further accumulation and retention, by Hancock of excess funds in the Pension Administration Fund and (iii) to prevent the imposition by Hancock of unwarranted asset liquidation adjustments or other charges;

(F) that Hancock be removed as a party in interest and a fiduciary with respect to the Plan, and as a consequence of such removal that, among other things, (i) Hancock cease all its actions and activities with respect to Plan assets, Plan moneys or other property and Plan administration, and (ii) Hancock make payments to Sperry Trust as demanded in (A), (B), (C) and (D) above;

(G) that Hancock be enjoined from breaching, violating and failing to discharge its duties and obligations under ERISA;

(H) that Hancock pay to Sperry Trust its attorney's fees and costs incurred in this action.

II. On the second cause of action:

(A) that Hancock (i) pay all non-guaranteed benefits due and owing as of trial and (ii) pay as punitive damages twice the amount of such non-guaranteed benefits;

and

(B) directing Hancock to pay all non-guaranteed benefits designated to be paid under the Plan after trial.

The payment of benefits in accordance with (A) and (B) above to be derived from all funds in the Pension

Administration Fund in excess of the Liabilities of the Fund to be calculated (1) utilizing rate tables consistent with and in accordance with sound actuarial principles; or (2) utilizing the case rate used by Hancock for the Pension Administration Fund; or (3) utilizing the 1968 Amendment Hancock rate tables.

III. On each of the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action, that Hancock:

(A) transfer and payover to Sperry Trust all funds in the Pension Administration Fund as of the trial; or in the alternative,

(B) transfer and payover to Sperry Trust all funds in the Pension Administration Fund in excess of the Liabilities of the Fund as of the trial, such Liabilities of the Fund to be calculated (1) utilizing rate tables consistent with and in accordance with sound actuarial principles, or, in the alternative (2) utilizing the case rate used by Hancock for the Pension Administration Fund.

The transfer and payment in accordance with (A) or (B) above to be with no reduction or diminution in amount for asset liquidation adjustments or any other charges.

IV. On each of the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action, that Hancock pay to Sperry Trust damages in an amount to be determined at trial.

V. On the Seventh Cause of Action, that GAC 50 is of no force and effect and that Hancock transfer and pay over to Sperry Trust all funds in the Pension Administration Fund without the purchase of annuities and without reduction or diminution in amount for asset liquidation adjustments or any other charges.

VI. On the Thirteenth Cause of Action, that GAC 50 and the 1968 Amendment be reformed to include without limitation provisions (i) to require proper annual calculations of the Liabilities of the Fund, (ii) to prevent the retention, and further accumulation and retention, by Hancock of excess funds in the Pension Administration Fund and (iii) to prevent the imposition by Hancock of unwarranted asset liquidation adjustments or other charges.

VII. On the Fourteenth Cause of Action, that Hancock pay Sperry Trust (in addition to the compensatory damages and other relief previously demanded) as punitive damages an amount equal to not less than the amount presently in the Pension Administration Fund.

VIII. On each of all of the causes of action, that Hancock pay Sperry Trust interest, and costs and disbursements including attorneys' fees.

IX. Such further and other relief as this Court deems just and proper.

Dated: New York, New York
March 30, 1984

ANDERSON RUSSELL KILL & OLICK, P.C.

By /s/ Lawrence Kill
Lawrence Kill

By /s/ Richard W. Collins
Richard W. Collins

Attorneys for Plaintiff
666 Third Avenue
New York, New York 10017
(212) 850-0700

Answer and Counterclaims

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHASE MANHATTAN BANK, N.A. as Trustee of the Sperry Master Retirement Trust No. 2,	:	
Plaintiff,	:	83 Civ. 5401 (JFK)
– against –	:	ANSWER AND COUNTERCLAIMS
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,	:	
Defendant.	:	

Defendant John Hancock Mutual Life Insurance Company ("Hancock"), by its attorneys Reboul, MacMurray, Hewitt, Maynard & Kristol, for its answer to the amended complaint:

1. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraph 1 thereof.

2. Denies each and every averment of paragraph 2 thereof, except states (a) that Hancock is a Massachusetts corporation having its principal place of business in Boston, Massachusetts, and is licensed, does business and has offices within the State of New York and (b) that, in respect of the matters in issue in the amended complaint, Hancock has acted and continues to act as an insurance carrier.

3. Denies each and every averment of paragraph 3 thereof, except states that the complaint herein alleges breaches by Hancock of duties and obligations under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et*

seq. ("ERISA"), and breaches of contract and misconduct on the part of Hancock in connection with a certain group annuity contract.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraph 4 thereof, except states (a) that this action purports to involve breaches, violations and failures by Hancock in violation of ERISA and (b) that jurisdiction is purported to be based upon the statutes referred to therein.

5. Denies each and every averment of paragraph 5 thereof, except (a) states (i) that on May 24, 1943, Hancock executed Group Annuity Contract No. 50 GAC ("GAC 50"), effective March 1, 1941, and (ii) that, effective May 1, 1978, Chase Manhattan Bank, N.A. as Trustee under the Sperry Master Retirement Trust No. 2, was substituted for Sperry Corporation as the GAC 50 contractholder and (b) respectfully refers the Court to GAC 50 for its contents.

6. Denies each and every averment of paragraphs 6 through 8 thereof, except (a) states (i) that GAC 50 was amended effective January 1, 1968 (the "1968 Amendment"), and (ii) that Hancock participated in the preparation of the 1968 Amendment and (b) respectfully refers the Court to the 1968 Amendment for its contents.

7. Denies each and every averment of paragraph 9 thereof, except states (a) that the Liabilities of the Fund are determined pursuant to the terms of the 1968 Amendment and (b) that, at the time of Sperry Trust's entry into the 1968 Amendment and thereafter, Hancock acted as an insurance carrier.

8. Denies each and every averment of paragraph 10 thereof, except (a) states that the 1968 Amendment requires contributions by the Employer, as defined in Article I, Section 23, of the 1968 Amendment, under certain circumstances and provides for the termination of GAC 50 under certain circumstances and (b) respectfully refers the Court to the 1968 Amendment for its contents.

9. Denies each and every averment of paragraph 11 thereof, except (a) states (i) that effective August 1, 1977, GAC 50 was amended by an agreement executed by Hancock and Sperry Rand Corporation (the "1977 Amendment"), (ii) that as a consequence of the 1977 Amendment the number of employees (as defined in GAC 50, as amended) and the retirement benefits to which they were entitled were, for purposes of calculating the Liabilities of the Fund (as defined in GAC 50), fixed and (iii) that at all relevant times the book value of the Pension Administration Fund has exceeded the Liabilities of the Fund and (b) respectfully refers the Court to the 1977 Amendment for its contents.

10. Denies each and every averment of paragraph 12 thereof, except states that pursuant to the 1977 Amendment Hancock paid certain non-guaranteed benefits.

11. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraph 13 thereof.

12. Denies each and every averment of paragraphs 14 through 21 thereof, except (a) states that documents bearing the dates designated therein were exchanged between Sperry Corporation and Hancock and (b) respectfully refers the Court to those documents for their contents.

13. Denies each and every averment of paragraph 22 thereof, except states that Hancock has not made any payments of non-guaranteed benefits since June 1982.

14. Denies each and every averment of paragraph 23 thereof, except states that at all relevant times the book value of the Pension Administration Fund has exceeded the Liabilities of the Fund.

15. Denies each and every averment of paragraph 24 thereof, except states that the determination of the amount by which the book value of the Pension Administration Fund under GAC

50 exceeds the Liabilities of the Fund is dependent upon the proper calculation of the Liabilities of the Fund.

16. Denies each and every averment of paragraph 25 thereof, except states that the method employed by Hancock each year to determine the Liabilities of the Fund has been to utilize the rate tables contained in the 1968 Amendment.

17. Denies each and every averment of paragraph 26 thereof, except respectfully refers the Court to the 1968 Amendment for its contents.

18. Denies each and every averment of paragraph 27 thereof, except states that at all relevant times since the effective date of the 1977 Amendment the book value of the Pension Administration Fund has exceeded the Liabilities of the Fund.

19. Denies each and every averment of paragraph 28 thereof.

20. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraphs 29 and 30 thereof.

21. Denies each and every averment of paragraphs 31 and 32 thereof, except states that Hancock and Sperry Corporation conducted negotiations with respect to the application of the excess of the book value of the Pension Administration Fund over the Liabilities of the Fund.

22. Denies each and every averment of paragraph 33 thereof, except respectfully refers the Court to the 1968 Amendment for its contents.

23. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraph 34 thereof.

24. Denies each and every averment of paragraph 35 thereof.

25. States that it is without knowledge or information sufficient to form a belief as to the truth of any of the averments of paragraphs 36 and 37 thereof.

26. With respect to the averments of paragraph 38 thereof, repeats and reavers each and every averment of paragraphs 1 through 25 hereof as if fully set forth herein.

27. Denies each and every averment of paragraphs 39 through 41 thereof.

28. With respect to the averments of paragraph 42 thereof, repeats and reavers each and every averment of paragraphs 1 through 25 and 27 hereof as if fully set forth herein.

29. Denies each and every averment of paragraphs 43 and 44 thereof.

30. With respect to the averments of paragraph 45 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27 and 29 hereof as if fully set forth herein.

31. Denies each and every averment of paragraphs 46 and 47 thereof, except respectfully refers the Court to the 1968 Amendment for its contents.

32. Denies each and every averment of paragraph 48 thereof.

33. Denies each and every averment of paragraph 49 thereof, except states that Hancock uses and has used the 1968 rate basis and tables in determining the Liabilities of the Fund.

34. Denies each and every averment of paragraph 50 thereof.

35. With respect to the averments of paragraph 51 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29 and 31 through 34 hereof as if fully set forth herein.

Normal Retirement Date the same Normal Retirement Annuity which would have been provided for him if he had elected option (a) of B of this sub-section.

The Company reserves the right not to grant option (b) of A of this sub-section if the yearly amount of Retirement Annuity to be provided thereunder would be less than $60 unless the employee has

(a) met the vesting requirements as determined under the terms of Part A, Part B, Part C, Part D or Part E of the Contract, whichever is applicable to him, as in effect on December 31, 1967, or

(b) met the vesting requirements as determined by the Retirement Committee in accordance with the Plan.

Subject to this limitation, and unless within ninety days after the Termination of Employment Date of the employee he elects option (a) of either A or B of this sub-section, whichever is applicable to him, option (b) of A or B, whichever is applicable to him, shall be deemed to have been elected automatically.

D. If the Termination of Employment Date of an employee is prior to January 1, 1968, the provisions of this Section as in effect prior to January 1, 1968 shall be applicable.

E. On written request of the employee alone, filed with the Company at its Home Office, an earlier Optional Retirement Date or an Optional Form of Retirement Annuity may be granted to such employee with respect to any Retirement Annuity

to be provided under this sub-section, subject to the conditions and provisions of this Contract otherwise applicable to such options.

II. Provisions Applicable to an Employee with Respect to Retirement Annuities provided under the Plan on and after January 1, 1968.

A. If the Termination of Employment Date of the Employee occurs prior to the discontinuance of the payment of Contributions hereunder in accordance with Section 7 of Article III and provided the employee meets the vesting requirements as determined by the Retirement Committee in accordance with the Plan, the employee shall be entitled on his Normal Retirement Date to the yearly amount of Normal Retirement Annuity provided on his account in accordance with the Plan, as determined by the Retirement Committee, exclusive of that portion of such Retirement Annuity, if any, described in I above.

B. If the Termination of Employment Date of the Employee occurs on or after the date of discontinuance of the payment of contributions hereunder in accordance with Section 7 of Article III and prior to the termination of the Fund, the employee shall be entitled on his Normal Retirement Date to the yearly amount of Normal Retirement Annuity provided on his account in accordance with the Plan, as determined by the Retirement Committee, exclusive of that portion of such Retirement Annuity, if any, described in I above.

The provisions of this sub-section shall not be applicable during any period in which the first paragraph of Section 8 of Article III is in effect.

SECTION 7. Instalment Payment of Cash Surrender Values

The Company may elect at any time to pay any employee's cash surrender value in twelve successive monthly instalments,

with the first instalment being due on the date such cash surrender value would otherwise be payable to the employee.

If any cash surrender values are paid in instalments, interest on the unpaid instalments thereof shall be allowed at the effective rate of three per cent per annum, compounded annually, from the dates on which such cash surrender values would otherwise have been payable.

SECTION 8. Cancellation of Retirement Annuity Payments to an Employee

If an employee re-enters the employ of the Employer subsequent to his Annuity Commencement Date and prior to his Normal Retirement Date, that portion of the Retirement Annuity payments otherwise due and payable to the employee in accordance with the Plan, as determined by the Retirement Committee, which is in excess of the amount, if any, of the Retirement Annuity due and payable to the employee on account of Retirement Annuities in effect with respect to him which were cancelled on January 1, 1968, shall be cancelled by the Company on the first day of the month next following the date on which the Company receives written notice from the Retirement Committee at its Home Office that the employee is re-employed; provided, however, such notice must be received by the Company prior to the date of termination of the Fund and at least thirty days prior to the date on which Annuity payments are to be suspended with respect to such employee. Upon receipt of written notice from the Retirement Committee at least thirty days prior to the subsequent Annuity Commencement Date of the employee that the employee is to retire from the service of the Employer, the Company shall resume Retirement Annuity payments to the employee. The yearly amount of the Retirement Annuity payable to the employee commencing on his subsequent Annuity Commencement Date shall, subject to the terms and conditions hereof, be equal to the sum of the yearly amount of Retirement Annuity payable to the employee on account of Retirement Annuities in effect with respect to him which were cancelled on January 1, 1968 and the yearly amount of

Retirement Annuity determined by the Retirement Committee in accordance with the Plan, which is provided on his account on his subsequent Annuity Commencement Date.

ARTICLE V. GENERAL PROVISIONS

SECTION 1. Certificates

The Company shall issue to the Retirement Committee, for delivery to each employee covered hereunder, an individual Certificate containing in substance a statement of the benefits to which the employee is entitled under this Contract and stating the name of the beneficiary to whom any death benefit shall be payable. In the event the Certificate of an employee is lost the Company on receipt of written notice thereof at its Home Office on the Company's prescribed form shall issue a new Certificate for such employee.

The Certificate delivered to an employee covered hereunder shall be surrendered to the Company before it shall pay a death benefit to the beneficiary. The word "Certificate" as used herein includes Certificate riders, if any.

SECTION 2. Beneficiary

An employee covered hereunder may designate the beneficiary to whom any death benefit shall be payable and may from time to time, so long as there is any benefit payable thereto in event of his death, change such beneficiary by filing written notice thereof with the Company at its Home Office. Such change shall take effect, upon receipt of such written notice at the Home Office of the Company, as of the date the employee signed such written notice, whether or not the employee is living at the time of such receipt and without prejudice to the Company on account of any payment made by it before such receipt of such written notice.

In the event of the death of any beneficiary prior to that of the employee, the interest of such beneficiary shall vest in the employee by whom he was designated. Any amount payable hereunder as a death benefit which is not payable to a designated beneficiary, shall be payable to the executors or administrators of the employee, except that the Company may in such case,

at its option, make payment of such amount to any one of or jointly to any number of the following surviving relatives of the employee; wife, husband, mother, father, child or children, brother or brothers, sister or sisters; and such payment shall completely discharge the liability of the Company with respect to the amount so paid.

SECTION 3. Facility of Payment

If any payee hereunder is, in the judgment of the Company, legally, physically, or mentally incapable of personally receiving and receipting for any payment due hereunder, the Company may make payment of the amounts payable to such other person, persons, or institution who, in the opinion of the Company, are then maintaining or have custody of such payee, until claim is made by a duly appointed guardian or other legal representative of such payee. Such payments shall constitute a full discharge of the liablity of the Company to the extent thereof.

SECTION 4. Assignment of Contract or Benefits Prohibited

Any assignment of this Contract shall be void. To the extent permitted by law, the benefits or any part thereof payable under this Contract, shall not be subject to commutation, anticipation, encumbrance, alienation, or assignment by any person entitled thereto; and no payments of interest or principal hereunder shall be subject to any debts, contracts, or engagements of any such person, or to any judicial process to levy upon or attach the same for the payment thereof; provided, however, that any employee who elects a cash surrender value in accordance with Section 6 of Article IV may assign the amount of cash surrender value due him, but any such assignment must be in writing and shall not be binding upon the Company until the original or duplicate thereof has been filed with the Company at its Home Office. The Company will assume no responsibility as to the validity of any such assignment.

SECTION 5. Information to be Furnished - Misstatements.

Either or both the Retirement Committee and the employee shall furnish all information such as evidence of health, data, proofs, certificates of birth and death and evidence of survival, which the Company may reasonably require on or with regard to the happening of any event of existence of any status affecting or relating to the coverage of any employee whether before or after commencement of Retirement Annuity payments hereunder. The Retirement Committee shall furnish the Company with all information which the Company may reasonably require to mak estimates of cost and valuations in accordance with the provisions of this Contract.

Determination by the Pension Committee of the amount and annual rate of Compensation of an employee applicable to any calculations hereunder, of the classification of any employee for any purpose hereunder and of the number of years of service of an employee in any capacity, shall be conclusive for the purposes of this Contract.

If it shall be found that the age, sex or any other relvant fact with respect to an employee has been misstated, an equitable adjustment shall be made in the Liabilities of the Fund or in the Considerations applied on termination of the Fund on account of such employee.

Nothing in this Contract shall be construed as giving any benefit in excess of the benefit to which an employee would have been entitled on the basis of the correct age, sex, or any other relevant fact with respect to such employee; and no greater amount of benefit shall be payable by the Company on account of an employee than would have been provided on the basis of the correct information and the actual considerations paid to and received by the Company on such account. Any overpayment or excess credit by the Company shall, with interest at the rate of five per cent per annum, be charged at the option of the Company, either in a single sum against the Fund or against

ARTICLE V

any further payments or credits to either or both such employee and Employer. Any underpayment by the Company shall be paid to the person entitled thereto.

Wherever in this Section the word "Employee" is used, it shall be deemed in all instances where appropriate to include the Contingent Annuitant, if any, designated by the employee.

SECTION 6. Evidence of Survival

The Company shall have the right to require satisfactory evidence that an employee or Contingent Annuitant is living on each and every date when a Retirement Annuity payment is due such employee or Contingent Annuitant. In the absence of such evidence when requested by the Company, any payments otherwise due shall not be made until such evidence shall have been received. The Company shall also have the right to require satisfactory evidence that a beneficiary receiving payments under the Option of Life Annuity with Payments for Five Years Certain, the Option of Life Annuity Payments for Ten Years Certain, the Option of Life Annuity with Payments for Fifteen Years Certain, or the Option of Life Annuity with Payments for Twenty Years Certain, is living on each and every date when an annuity payment is due such beneficiary.

SECTION 7. Participation in Divisible Surplus

This Contract is a participating Contract. The Company shall annually ascertain and apportion any divisible surplus accruing under contracts of this class. Any such divisible surplus apportioned to this Contract shall be credited to the Fund and shall be considered a part of any Contribution paid to the Company in the Contract Year in which such dividend is so apportioned, unless termination of the Fund has occurred, in which event any such divisible surplus shall be paid in cash to the Employer. In lieu of such credit to the Fund, the Employer may direct, in a written notice filed with the Company, at its Home Office, that any such divisible surplus be placed in whole or in part in the Supplemental Fund.

ARTICLE V

SECTION 8. Modification of This Contract

This Contract may be modified or altered at any time by agreement between the Company and the Employer. Except as provided in the second, third and fourth succeeding paragraphs, this Contract may also be modified or altered in any respect by the Company on January 1, 1973 and on each January 1st thereafter, upon written notice to the Employer not less than ninety days prior thereto, and if the Employer does not file written notice with the Company at its Home Office of its assent to any such modification or alteration prior to the proposed effective date thereof, then it shall become effective only insofar as it affects

(a) the rates in Article VI and the method of their application, and

(b) the amount of deduction to be made from the share of net interest which is added to the Fund in accordance with the first paragraph of Section 3 of Article III, and the amount of deduction to be made from the share of net investment earnings which is added to the Supplemental Fund in accordance with the first paragraph of sub-section B of Section 10 of Article III, and

the payment of contributions hereunder may be discontinued in accordance with Section 7 of Article III.

Any modification or alteration in this Contract shall not affect the amount or the terms of the Retirement Annuities provided or purchased hereunder prior to the effective date of such modification or alteration; provided, however, that either or both the amount and the terms of Retirement Annuities provided or purchased on account of such modification or alteration in this Contract may be affected by further modifications or alterations made in this Contract for the purposes of conforming this Contract under the Internal Revenue Code of the United States as required by the United States Treasury Department on review of the Contract pursuant to a request for a determination letter.

The rate of interest used in calculating Employee's Accumulations and the rates set forth in Table 1 of Article VI which are applicable to the determination of the amount of Retirement Annuity on account of Employee's Accumulations shall remain in effect with respect to Employee's Contributions being held by Company on January 1, 1968 and the interest thereon until all of the Employee's Contributions and interest theron have been used to provide or purchase Annuities, or pay cash Surrender values or death benefits.

Unless otherwise mutually agreed upon between the Employer and the Company, the rates shown in Tables 2a, 2b, 2c, 3b, 3c, 4a, 4b, 4c, 5a, 5b, 5c, 6a, 6b, 6c, 7a, 7b and 7c of Article VI, including the annual increases described in such Tables, shall remain in effect for the determination of the amounts to be included in the Liabilities of the Fund on any date with respect to all Annuities provided hereunder prior to January 1, 1973 and all Annuities cancelled on January 1, 1968 and shall be applicable with respect to all Annuities purchased hereunder on the date of termination of the Fund which were provided prior to January 1, 1973 or which were provided in accordance with Section 7 of Article III on account of the Annuities which were cancelled on January 1, 1968 regardless of when such termination of the Fund occurs.

Unless otherwise mutually agreed upon between the Employer and the Company, the 1% rate of deduction from the share of net interest which is added to the Fund in accordance with the first paragraph of Section 3 of Article III shall remain in effect with respect to the portion of such net interest as the Company determines is attributable to the balance, if any, in the Fund on any date arising from Contributions made hereunder prior to January 1, 1973. Unless otherwise mutually agreed upon between the Employer and the Company, the 1% rate of deduction from the share of net investment earnings which is added to the Supplemental Fund in accordance with the first paragraph of sub-section B of Section 10 of Article III shall remain in effect with respect to the portion of such net interest earnings as

the Company determines is attributable to the balance, if any, in the Supplemental Fund on any date arising from Contributions made hereunder prior to January 1, 1973.

No person except the President, a Vice President, the Secretary or an Assistant Secretary of the Company is authorized to waive, alter, modify, or change any of the conditions or the provisions of this Contract, including this provision, or of any endorsement hereon, or to waive any forfeiture hereof, to extend credit or the time for the payment of any contribution or any moneys due the Company, or to bind it by making any statement or receiving at any time any notice or information not contained in the application for this Contract.

No person except the President, a Vice President, the Secretary or the Treasurer of the Employer is authorized to waive, alter, modify, or change any of the conditions or the provisions of this Contract, including this provision, or of any endorsement hereon.

SECTION 9. Employer or Retirement Committee Not Agents of Company

The Employer or the Retirement Committee shall in no event be considered the agents of the Company for any purpose under this Contract.

SECTION 10. Construction

This Contract, and all rights thereunder, shall be construed, administered, and governed in all respects in accordance with the laws of the State of New York.

The Plan is not a part of the Contract. The Company's rights and obligations shall be governed by the provisions of the Contract notwithstanding any contrary provisions of the Plan.

SECTION 11. Funds Under This Contract

All monies under this Contract shall be part of the general corporate funds of the Company. The Supplemental Fund and

all monies therein shall be assigned to the Separate Investment Account of the Company.

SECTION 12. Management of Separate Investment Account

The Company shall be the sole owner of the assets in and shall have the sole right to control, manage and administer the Separate Investment Account and each investment class it establishes within such Account and may take any action which, in its judgment, is necessary or desirable for carrying out its duties in connection therewith, including but not limited to the right:

(a) to invest and reinvest all monies attributable to an investment class in such securities of any kind or character which the Company in its sole discretion may select consistent with the investment policy established by the Company for such investment class,

(b) to sell, convey, transfer, exchange and otherwise dispose of property from time to time in such manner and upon such terms as it, in its sole discretion, may determine,

(c) to retain in cash without liability for interest such funds as it shall deem reasonable, and

(d) to establish and withdraw (subject to the provision in the last sentence of sub-section A of Section 10 of Article III) any investment class or classes within the Separate Investment Account.

The Company shall use its best judgment in taking any action and shall be bound at all times to act in good faith. However, it shall not be liable for any losses which may be incurred upon investments in the Separate Investment Account or for any error of judgment or mistake of law or act or for any act or omission so long as it has acted in good faith.

The Employer, its successors and assigns, shall have no individual ownership in or to any investments or assets in the Separate Investment Account and neither the allocation to this Contract of a pro rata share of monies in an investment class or classes nor the records and accounts kept in connection therewith shall be deemed to confer any such ownership.

SECTION 13. Application of Rate Tables

Table 1

In the application of Table 1 of Article VI, the yearly amount of Immediate Annuity with respect to an employee shall be determined on the first day of any month by the amount shown for the sex and at the attained age of the employee on his birthday last preceding such date, with an addition to the amount for such age, for each month elapsing between the first day of the month nearest such birthday and such date of an amount equal to one-twelfth of the difference between such amount and the amount for an age one year older.

Tables 2a, 2b and 2c

In the application of Table 2a, Table 2b and Table 2c of Article VI, the Consideration with respect to an employee shall be determined

(a) On any December 31 by the rate shown for the sex of the employee in the column headed by the appropriate ratio of death benefit to Retirement Annuity or, in the case where no death benefit is provided on such December 31, in the column headed by "No Death Benefit" and at the age the employee attains during the calendar year in which such December 31 falls, and

(b) on any date other than December 31 by the rate applicable to such employee on the December 31 immediately preceding such date with a deduction from such rate for each month elapsing between

such December 31 and such date of an amount equal to one-twelfth of the difference between such rate and the rate applicable to such employee on the immediately following December 31.

The ratio of death benefit to Retirement Annuity for an employee as of any December 31 is equal to the number of years elapsing between such December 31 and the December 31 of the calendar year immediately preceding the calendar year in which the death benefit ceases.

Any amount determined in accordance with this Table on account of a Contingent Annuitant will be determined as though the Contingent Annuitant were an employee.

Tables 3b and 3c

In this application of Table 3b and Table 3c of Article VI, the Consideration with respect to an employee shall be determined

(a) on any December 31 by the rate shown for the sex of the employee, in the column headed by the appropriate ratio of Employee's Accumulation to Deferred Annuity, or in the case where no death benefit is provided on such December 31, in the column headed by "No Death Benefit", and at the age the employee attains during the calendar year in which such December 31 falls and

(b) on any date other than December 31 by the rate applicable to such employee on the December 31 immediately preceding such date with an addition to such rate for each month elapsing between such December 31 and such date of an amount equal to one-twelfth of the difference between such rate and the rate applicable to such employee on the immediately following December 31.

The ration of Employee's Accumulation to Deferred Annuity for an employee as of any December 31 is equal to the largest integer in the ratio of the Employee's Accumulation immediately prior to the Normal Retirement Date to the amount of Normal Retirement Annuity.

Tables 4a, 4b and 4c

In the application of Table 4a, Table 4b and Table 4c of Article VI, the Consideration with respect to a Contingent Annuitant shall be determined.

(a) on any December 31 by the rate shown for the sex of the employee and the Contingent Annuitant and at the age the employee and the Contingent Annuitant attain during the Calendar Year in which such December 31 falls, and

(b) on any date other than December 31 by the rate applicable to such employee and Contingent Annuitant on the December 31 immediately preceding such date with a deduction from such rate for each month elapsing between such December 31 and such date of an amount equal to one-twelfth of the difference between such rate and the rate applicable to such employee and Contingent Annuitant on the immediately following December 31.

Tables 5a, 5b and 5c

In the application of Table 5a, Table 5b and Table 5c of Article VI, the Consideration with respect to an employee shall be determined

(a) on any December 31 by the rate shown for the sex of the employee corresponding to the number of years in the certain period for which the annuity is to be paid and on the line corresponding to the age the employee attains during the calendar year in which such December 31 falls, and

(b) on any date other than December 31 by the rate applicable to such employee on the December 31 immediately preceding such date with a deduction from such rate for each month elapsing between such December 31 and such date of an amount equal to one-twelfth of the difference between such rate and the rate applicable to such employee on the immediately following December 31.

In determining the number of years in the certain period for which the annuity is to be paid, subtract the calendar year in which such determination is to be made from the calendar year in which the annuity ceases to be payable on a certain basis, and if the period in which the annuity is to be payable has expired the rate will be determined from the column headed "NS" and on the line corresponding to the age the employee attains during the calendar year in which such December 31 falls.

Tables 6a, 6b and 6c

In the application of Table 6a, Table 6b and Table 6c of Article VI, the Consideration with respect to a beneficiary shall be determined

(a) on any December 31 by the number of years for which the annuity is to be paid. In determining the number of years in which payments are to be made, subtract the calendar year in which such determination is made from the calendar year preceding that in which the final payment is due, and

(b) on any date other than December 31 by the rate applicable to such beneficiary on the December 31 immediately preceding such date with a deduction from such rate for each month elapsing between such December 31 and such date of an amount equal to one-twelfth of the difference between such rate and the rate applicable to such beneficiary on the immediately following December 31.

Tables 7a, 7b and 7c

In the application of Table 7a, Table 7b, Table 7c of Article VI, the Consideration with respect to an employee shall be determined

(a) on any December 31 by the rate shown for the sex of the employee, in the column headed by the appropriate ratio of death benefit to Retirement Annuity or, in the case where no death benefit is provided on such December 31, in the column headed by "No Death Benefit", and at the age the employee attains during the calendar year in which such December 31 falls, and

(b) on any date other than December 31 by the rate applicable to such employee on the December 31 immediately preceding such date with a deduction from such rate for each month elapsing between such December 31 and such date of an amount equal to one-twelfth of the difference between such rate and the rate applicable to such employee on the immediately following December 31.

The ratio of death benefit to Retirement Annuity for an employee as of any December 31 is equal to the number of years elapsing between such December 31 and the December 31 in the calendar year immediately preceding the calendar year in which the death benefit ceases.

SECTION 14. Incontestability

This Contract shall be incontestable, except for non-payment of considerations, after it has been in effect for one year from its date of issued.

SECTION 15. Entire Contract

This Contract and the application of the Employer, a copy of which is attached hereto and made a part hereof, constitute

the entire Contract between the parties hereto. All statements made by the Employer shall, in the absence of fraud, be deemed representations and not warranties. The employee's Certificate shall not be deemed a part of this Contract.

SECTION 16. Non-Waiver of Contract Provisions

The failure on the part of the Company or of the Employer to perform or to insist upon the strict performance of any term, provision or condition of this Contract, shall neither constitute a waiver on the part of the Company or of the Employer of its right to perform or require the performance of such term, provision or condition nor estop it from exercising any other rights it may have under such term, provision or condition or otherwise under this Contract.

ARTICLE VI. TABLES

TABLE I

YEARLY AMOUNT OF IMMEDIATE ANNUITY ON ACCOUNT OF EMPLOYEE'S ACCUMULATION

Yearly Amount of Immediate Annuity which must be Provided on account of $100 of Employee's Accumulation if Applied in One Sum to Provide an Immediate Annuity in accordance with Section 4 of Article II and Section 6 of Article IV.

Male Employee	Attained Age Of Employee	Female Employee
$5.41	55	$4.97
5.51	56	5.05
5.62	57	5.13
5.73	58	5.22
5.84	59	5.31
5.97	60	5.41
6.09	61	5.51
6.23	62	5.62
6.37	63	5.73
6.52	64	5.84
6.67	65	5.97
6.83	66	6.09

Reference should be made to Section 13 of Article V to determine the correct age to use in the application of the amounts shown above.

Rates for other ages will be furnished by the Company on request of the Retirement Committee.

RSK-$100 MF Imm.
D16303

ARTICLE VI. TABLES

TABLES 2a

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF IMMEDIATE ANNUITIES IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicable in the calendar year 1969 will be increased 1/2% over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased 1/2% over the rates for the immediately preceding calendar year.

Amount of Consideration Required on account of an Employee in One Sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase an Immediate Annuity of $10 per annum.

Attained Age of Employee Male	Female	No Death Benefit	Ratio of Death Benefit to Retirement Annuity 0	1	2	3	4	5	6	7
	50	$155.77	$155.77	$155.80	$155.86	$155.96	$156.09	$156.26	$156.47	$156.73
	51	153.56	153.56	153.60	153.67	153.77	153.92	154.11	154.35	154.64
	52	151.29	151.30	151.34	151.42	151.54	151.70	151.92	152.18	152.50
	53	149.98	148.99	149.03	149.12	149.25	149.44	149.68	149.97	150.33
	54	146.61	146.62	146.67	146.77	146.92	147.13	147.39	147.72	148.11
	55	144.20	144.21	144.27	144.38	144.54	144.77	145.07	145.43	145.86
	56	141.74	141.76	141.82	141.94	142.12	142.38	142.70	143.10	143.57
	57	139.24	139.25	139.32	139.45	139.66	139.93	140.29	140.72	141.23
	58	136.69	136.70	136.77	136.92	137.14	137.45	137.84	138.31	138.86
	59	134.08	134.10	134.18	134.34	134.58	134.92	135.34	135.85	136.45
55	60	131.43	131.45	131.54	131.71	131.98	132.34	132.80	133.35	134.00
56	61	128.73	128.75	128.84	129.03	129.32	129.71	130.21	130.81	131.51
57	62	125.97	125.99	126.09	126.30	126.61	127.03	127.57	128.22	128.98
58	63	123.15	123.18	123.29	123.51	123.85	124.30	124.88	125.58	126.41
59	64	120.27	120.30	120.42	120.66	121.02	121.52	122.14	122.90	123.80
60	65	117.33	117.36	117.49	117.75	118.14	118.68	119.36	120.18	121.16
61	66	114.33	114.36	114.50	114.78	115.21	115.79	116.53	117.43	118.50

TABLE 2a, ARTICLE VI
Amendment effective January 1, 1968

Form 100-50 GAC-10

Attained Age of Employee Male	Female	No Death Benefit	Ratio of Death Benefit to Retirement Annuity 0	1	2	3	4	5	6	7
62	67	111.26	111.29	111.44	111.75	112.22	112.86	113.66	114.65	115.82
63	68	108.14	108.17	108.34	108.67	109.19	109.88	110.77	111.85	113.13
64	69	104.96	105.01	105.18	105.55	106.12	106.89	107.86	109.05	110.45
65	70	101.76	101.80	102.00	102.41	103.03	103.88	104.95	106.25	107.78
66	71	98.53	98.58	98.80	99.25	99.94	100.87	102.05	103.46	105.13
67	72	95.30	95.36	95.60	96.10	96.86	97.88	99.16	100.71	102.53
68	73	92.09	92.15	92.42	92.97	93.79	94.90	96.30	97.99	99.97
69	74	88.88	88.95	89.24	89.83	90.74	91.95	93.47	95.31	97.46
70	75	85.65	85.73	86.05	86.70	87.68	89.01	90.67	92.68	95.01
71	76	82.41	82.50	82.84	83.56	84.64	86.09	87.91	90.09	92.63
72	77	79.18	79.27	79.65	80.44	81.63	83.21	85.20	87.57	90.34
73	78	75.97	76.07	76.50	77.36	78.66	80.40	82.56	85.15	88.14
74	79	72.80	72.92	73.38	74.33	75.75	77.65	80.00	82.81	86.06
75	80	69.68	69.80	70.31	71.35	72.91	74.98	77.54	80.60	84.11

TABLE 2a, ARTICLE VI
Amendment effective January 1, 1968

Form 100-50 GAC-10

Reference should be made to Section 13 of Article V to determine the correct age and ratio to use in the application of the rates shown above.

Rates for other ages and when the ratio of death benefit to Retirement Annuity exceeds 7 will be furnished by the Company when necessary.

RS-p MF Imm.
D-16502

TABLE 3c

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF DEFERRED NORMAL ANNUITIES IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III

These rates apply to a Male Employee whose Normal Retirement Date is the First Day of the Month Coincident with or next following the Sixty-fifth Birthday of the Employee in accordance with Definition 5 of Article I.

Amount of Consideration Required on account of a Male Employee in One Sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase a Deferred Normal Annuity of $10 per annum.

Attained Age of Employee	No Death Benefit	Ratio of Employee's Accumulation to Deferred Annuity to be Provided or Purchased							
		0	1	2	3	4	5	6	7
30	$ 36.90	$ 37.38	$ 38.40	$ 39.55	$ 40.82	$ 42.23	$ 43.78	$ 45.48	$ 47.34
31	38.04	38.52	39.56	40.73	42.02	43.45	45.02	46.74	48.62
32	39.22	39.71	40.76	41.94	43.25	44.70	46.30	48.03	49.94
33	40.43	40.93	42.00	43.20	44.53	45.99	47.61	49.37	51.30
34	41.69	42.19	43.28	44.50	45.84	47.32	48.97	50.75	52.69
35	42.99	43.50	44.59	45.83	47.20	48.69	50.36	52.17	54.13
36	44.33	44.85	45.96	47.21	48.60	50.11	51.80	53.63	55.62
37	45.71	46.24	47.37	48.64	50.04	51.58	53.28	55.14	57.15
38	47.15	47.68	48.82	50.11	51.53	53.09	54.81	56.69	58.73
39	48.63	49.17	50.33	51.63	53.07	54.65	56.38	58.29	60.35
40	50.17	50.72	51.89	53.20	54.66	56.26	58.01	59.93	62.03
41	51.76	52.32	53.50	54.83	56.30	57.92	59.69	61.63	63.75
42	53.41	53.97	55.17	56.51	58.00	59.63	61.43	63.38	65.52
43	55.12	55.69	56.90	58.25	59.75	61.41	63.22	65.19	67.36
44	56.90	57.47	58.69	60.05	61.57	63.24	65.07	67.07	69.24
45	58.75	59.33	60.56	61.93	63.46	65.15	66.99	69.00	71.20
46	60.69	61.27	62.51	63.88	65.42	67.12	68.98	71.01	73.21
47	62.71	63.30	64.54	65.92	67.46	69.17	71.05	73.09	75.31

Attained Age of Employee	No Death Benefit	Ratio of Employee's Accumulation to Deferred Annuity to be Provided or Purchased							
		0	1	2	3	4	5	6	7
48	64.83	65.42	66.66	68.04	69.59	71.31	73.19	75.24	77.48
49	67.06	67.64	68.88	70.26	71.81	73.53	75.41	77.49	79.73
50	69.39	69.97	71.20	72.58	74.12	75.84	77.73	79.80	82.06
51	71.85	72.42	73.64	75.01	76.54	78.26	80.15	82.22	84.48
52	74.44	75.01	76.21	77.57	79.08	80.78	82.67	84.74	86.99
53	77.18	77.73	78.91	80.25	81.75	83.43	85.30	87.36	89.61
54	80.07	80.60	81.76	83.07	84.54	86.20	88.05	90.09	92.33
55	83.13	83.64	84.26	86.03	87.48	89.11	90.92	92.95	95.17
56	86.37	86.86	87.93	89.17	90.57	92.16	93.94	95.93	98.13
57	89.81	90.27	91.29	92.47	93.83	95.38	97.12	99.06	101.22
58	93.46	93.89	94.84	95.97	97.27	98.76	100.45	102.35	104.46
59	97.35	97.74	98.62	99.67	100.90	102.33	103.96	105.80	107.86
60	101.49	101.84	102.62	103.59	104.75	106.10	107.66	109.44	111.43
61	105.91	106.21	106.89	107.76	108.82	110.09	111.57	113.26	115.18
62	110.64	110.88	111.45	112.20	113.16	114.32	115.70	117.30	119.13
63	115.73	115.90	116.33	116.95	117.78	118.82	120.08	121.57	123.29
64	121.21	121.30	121.57	122.04	122.72	123.62	124.74	126.10	127.71

Reference should be made to Section 13 of Article V to determine the correct age and ratio to use in connection with the application of the rates shown above.

When the ratio of Employee's Accumulation exceeds 7, rates will be furnished by the Company when necessary.

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TABLE 3c - Continued

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF DEFERRED NORMAL ANNUITIES IN ACCORDANCE WITH SECTION 7 OF ARTICLE III TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III

These Rates Apply to A Female Employee whose Normal Retirement Date is the First Day of the Month Coincident with or next following the Sixtieth Birthday of the Employee in accordance with Definition 5 of Article I.

Amount of Consideration Required on account of a Female Employee in One Sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase a Deferred Normal Annuity of $10 per annum.

Attained Age of Employee	No Death Benefit	Ratio of Employee's Accumulation to Deferred Annuity to be Provided or Purchased							
		0	1	2	3	4	5	6	7
30	$ 64.79	$ 65.00	$ 65.45	$ 65.98	$ 66.56	$ 67.22	$ 67.95	$ 68.75	$ 69.63
31	66.77	66.99	67.45	67.98	68.57	69.23	69.97	70.78	71.67
32	68.82	69.04	69.51	70.04	70.64	71.31	72.05	72.87	73.77
33	70.94	71.16	71.63	72.17	72.78	73.45	74.20	75.03	75.94
34	73.12	73.34	73.82	74.36	74.98	75.66	76.41	77.25	78.17
35	75.38	75.60	76.08	76.63	77.25	77.93	78.69	70.54	80.47
36	77.70	77.93	78.41	78.97	79.59	80.28	81.05	81.90	82.84
37	80.11	80.33	80.82	81.38	82.01	82.71	83.48	84.34	85.28
38	82.59	82.82	83.31	83.87	84.50	85.21	85.99	86.85	87.80
39	85.15	85.38	85.88	86.44	87.08	87.79	88.58	89.44	90.40
40	87.80	88.03	88.53	89.09	89.74	90.45	91.24	92.12	93.08
41	90.54	90.77	91.27	91.84	92.48	93.20	94.00	94.88	95.84
42	93.37	93.61	94.11	94.67	95.32	96.04	96.84	97.73	98.70
43	96.30	96.54	97.04	97.60	98.25	98.98	99.78	100.67	101.65
44	99.34	99.57	100.07	100.63	101.28	102.01	102.82	103.71	104.69

TABLE 3c
ARTICLE VI
Amendment effective January 1, 1968

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Attained Age of Employee	No Death Benefit	Ratio of Employee's Accumulation to Deferred Annuity to be Provided or Purchased							
		0	1	2	3	4	5	6	7
45	102.47	102.70	103.20	103.77	104.41	105.14	105.95	106.85	107.83
46	105.73	105.95	106.45	107.01	107.65	108.38	109.19	110.09	111.08
47	109.09	109.32	109.81	110.37	111.01	111.74	112.55	113.44	114.43
48	112.59	112.81	113.30	113.85	114.49	115.21	116.01	116.91	117.90
49	116.23	116.44	116.92	117.47	118.10	118.81	119.61	120.50	121.49
50	120.01	120.23	120.69	121.23	121.85	122.55	123.34	124.23	125.20
51	123.97	124.17	124.62	125.15	125.75	126.44	127.22	128.09	129.06
52	128.10	128.29	128.73	129.23	129.82	130.50	131.26	132.12	133.07
53	132.43	132.61	133.02	133.50	134.07	134.73	135.47	136.31	137.24
54	136.97	137.14	137.52	137.97	138.52	139.14	139.86	140.68	141.59
55	141.74	141.90	142.24	142.66	143.17	143.76	144.45	145.24	146.12
56	146.77	146.90	147.20	147.58	148.04	148.60	149.25	150.00	150.85
57	152.06	152.16	152.41	152.74	153.16	153.67	154.28	154.98	155.79
58	157.65	157.72	157.91	158.18	158.55	159.00	159.55	160.20	160.96
59	163.55	163.59	163.71	163.91	164.21	164.60	165.09	165.68	166.37

TABLE 3c
ARTICLE VI
Amendment effective January 1, 1968

Form 100-50 GAC-10

Reference should be made to Section 13 of Article V to determine the correct age and ratio to use in connection with the application of the rates shown above.

Rates for other ages and when the ratio of Employee's Accumulation exceeds 7, will be furnished by the Company when necessary.

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TABLE 4a

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF A REVERSIONARY ANNUITY IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicable in the calendar year 1969 will be increased ½ % over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased ½ % over the rates for the immediately preceding calendar year.

These Rates Apply to the Contingent Annuitant of an Employee during the joint lifetime of the Contingent Annuitant and Employee.

Amount of Consideration Required on Account of a Contingent Annuitant in one sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase a Reversionary Annuity of $10 per annum payable to the Contingent Annuitant following the death of the Employee.

TABLE 4a
ARTICLE VI

Age of Contingent Annuitant		Age of Male Employee								
		60	61	62	63	64	65	66	67	68
		Age of Female Employee								
Male	Female	65	66	67	68	69	70	71	72	73
55	60	$30.03	$32.00	$34.07	$36.23	$38.48	$40.81	$43.20	$45.63	$48.10
56	61	28.52	30.42	32.43	34.53	36.71	38.98	41.31	43.68	46.09
57	62	27.03	28.87	30.80	32.83	34.95	37.15	39.42	41.73	44.08
58	63	25.56	27.33	29.19	31.15	33.20	35.34	37.54	39.79	42.07
59	64	24.11	25.81	27.60	29.49	31.47	33.53	35.66	37.84	40.07
60	65	22.70	24.32	26.04	27.85	29.76	31.74	33.80	35.91	38.07
61	66	21.31	22.86	24.50	26.24	28.07	29.98	31.96	34.00	36.08
62	67	19.96	21.43	23.00	24.66	26.41	28.24	30.14	32.10	34.11
63	68	18.65	20.04	21.53	23.11	24.78	26.53	28.36	30.24	32.17
64	69	17.38	18.70	20.11	21.60	23.19	24.86	26.61	28.41	30.26
65	70	16.16	17.40	18.73	20.15	21.65	23.24	24.90	26.62	28.39
66	71	14.99	16.15	17.41	18.74	20.17	21.67	23.25	24.88	26.57
67	72	13.87	14.96	16.14	17.40	18.74	20.16	21.65	23.20	24.80
68	73	12.81	13.83	14.93	16.11	17.37	18.71	20.12	21.59	23.11
69	74	11.80	12.75	13.78	14.89	16.07	17.33	18.65	20.04	21.56
70	75	10.85	11.73	12.69	13.72	14.82	16.00	17.24	18.54	19.98
71	76	9.94	10.76	11.65	12.60	13.63	14.73	15.90	17.11	18.38

TABLE 4a, ARTICLE VI

Reference should be made to Section 13 of Article V to determine the correct age to use in connection with the application of the rates shown above.

Rates for other combinations of ages will be furnished by the Company when necessary.

NS Imm. (Reversionary)

D-16502

TABLE 5a

RATES OF CONSIDERATION APPLICABLE TO THE PURCHASE OF IMMEDIATE ANNUITIES IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III WHEN A CERTAIN AND CONTINUOUS OPTION IS IN EFFECT.

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicable in the calendar year 1969 will be increased ½ % over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased ½ % over the rates for the immediately preceding calendar year.

Amount of Consideration Required on account of an Employee in one Sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase an Immediate Annuity, for a Certain and Continuous Period, the Yearly Amount of which is $10.

Attained Age of Employee											
Male	Female	20	19	18	17	16	15	14	13	12	11
50	55	$153.95	$153.00	$152.10	$151.24	$150.43	$149.67	$148.95	$148.28	$147.65	$147.05
51	56	152.35	151.32	150.34	149.41	148.53	147.70	146.93	146.20	145.52	144.90
52	57	150.76	149.65	148.58	147.58	146.62	145.72	144.88	144.09	143.36	142.63
53	58	149.19	147.98	146.83	145.74	144.70	143.73	142.82	141.96	141.17	140.44
54	59	147.63	146.33	145.09	143.91	142.79	141.73	140.74	139.81	138.95	138.16
55	60	146.10	144.70	143.36	142.08	140.87	139.72	138.65	137.64	136.71	135.85
56	61	144.61	143.10	141.65	140.27	138.96	137.72	136.55	135.46	134.45	133.51
57	62	143.15	141.53	139.97	138.48	137.06	135.72	134.45	133.27	132.17	131.15
58	63	141.74	140.00	138.32	136.71	135.18	133.73	132.36	131.07	129.88	128.75
59	64	140.39	138.51	136.71	134.97	133.32	131.75	130.27	128.88	127.58	126.39
60	65	139.09	137.08	135.14	133.28	131.50	129.80	128.20	126.69	125.29	123.99
61	66	137.86	135.72	133.64	131.64	129.72	127.89	126.15	124.52	123.00	121.58
62	67	136.71	134.42	132.20	130.05	127.98	126.01	124.14	122.37	120.72	119.18
63	68	135.65	133.21	130.83	128.53	126.31	124.19	122.17	120.26	118.47	116.80
64	69	134.67	132.08	129.55	127.09	124.71	122.43	120.25	118.19	116.25	114.44
65	70	133.78	131.05	128.36	125.74	123.19	120.75	118.40	116.18	114.08	112.12
66	71	132.98	130.10	127.26	124.48	121.77	119.15	116.63	114.23	111.97	109.85
67	72	132.27	129.26	126.27	123.32	120.44	117.64	114.95	112.37	109.93	107.64

Attained Age of Employee Male	Female	20	19	18	17	16	15	14	13	12	11
68	73	131.64	128.50	125.37	122.27	119.22	116.24	113.36	110.60	107.98	105.51
69	74	131.10	127.84	124.57	121.32	118.10	114.95	111.88	108.93	106.11	103.45
70	75	130.63	127.26	123.86	120.47	117.09	113.76	110.51	107.36	104.35	101.48
71	76	130.24	126.76	123.25	119.71	116.18	112.68	109.25	105.90	102.68	99.61
72	77	129.90	126.34	122.71	119.05	115.37	111.71	108.10	104.56	101.14	97.85
73	78	129.63	125.98	122.25	118.47	114.66	110.85	107.07	103.34	99.71	96.22
74	79	129.40	125.68	121.87	117.98	114.05	110.09	106.14	102.24	98.41	94.70
75	80	129.22	125.43	121.55	117.57	113.52	109.43	105.33	101.25	97.23	93.32

Reference should be made to Section 13 of Article V to determine the application of the rates shown above.

Rates for other attained ages will be furnished by the Company on request of the Employer.

20CC Graded to NS MF Imm

D-16502

TABLE 5a — Continued

RATES OF CONSIDERATION APPLICABLE TO THE PURCHASE OF IMMEDIATE ANNUITIES IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III WHEN A CERTAIN AND CONTINUOUS OPTION IS IN EFFECT.

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicable in the calendar year 1969 will be increased ½% over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased ½% over the rates for the immediately preceding calendar year.

Amount of Consideration Required on account of an Employee in one Sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase an Immediate Annuity, for a Certain and Continuous Period, the Yearly Amount of which is $10.

Attained Age of Employee												
Male	Female	10	9	8	7	6	5	4	3	2	1	NS
50	55	$146.55	$146.07	$145.64	$145.27	$144.94	$144.68	$144.46	$144.30	$144.19	$144.20	$144.20
51	56	144.32	143.80	143.33	142.92	142.57	142.27	142.04	141.86	141.74	141.74	141.74
52	57	142.06	141.49	140.99	140.54	140.15	139.83	139.57	139.37	139.24	139.24	139.24
53	58	139.76	139.15	138.60	138.11	137.69	137.34	137.05	136.84	136.69	136.69	136.69
54	59	137.43	136.76	136.17	135.64	135.18	134.80	134.49	134.25	134.10	134.09	134.08
55	60	135.06	134.34	133.70	133.13	132.63	132.22	131.88	131.62	131.45	131.44	131.43
56	61	132.66	131.88	131.19	130.57	130.04	129.58	129.22	128.94	128.76	128.74	128.73
57	62	130.23	129.39	128.63	127.97	127.39	126.90	126.51	126.21	126.00	125.98	125.97
58	63	127.77	126.85	126.04	125.32	124.69	124.16	123.74	123.41	123.20	123.17	123.15
59	64	125.29	124.29	123.40	122.62	121.94	121.37	120.91	120.56	120.33	120.29	120.27
60	65	122.79	121.70	120.73	119.88	119.15	118.53	118.03	117.65	117.39	117.35	117.33
61	66	121.58	120.28	119.10	118.04	117.11	116.30	115.63	115.09	114.67	114.40	114.35
62	67	117.77	116.48	115.32	114.30	113.42	112.68	112.09	111.64	111.34	111.29	111.26
63	68	115.26	113.86	112.60	111.48	110.51	109.70	109.05	108.56	108.23	108.17	108.14
64	69	112.77	111.24	109.86	108.64	107.58	106.69	105.98	105.44	105.08	105.00	104.96
65	70	112.12	110.30	108.64	107.14	105.81	104.65	103.67	102.88	102.28	101.89	101.80
66	71	107.88	106.07	104.44	102.98	101.72	100.65	99.78	99.12	98.68	98.58	98.53

TABLE 5a. ARTICLE VI
Amendment effective January 1, 1968

Attained Age of Employee												
Male	Female	10	9	8	7	6	5	4	3	2	1	NS
67	72	105.51	103.55	101.77	100.19	98.81	97.64	96.69	95.97	95.48	95.36	95.30
68	73	103.20	101.08	99.15	97.43	95.92	94.65	93.61	92.82	92.29	92.16	92.09
69	74	100.96	98.67	96.58	94.70	93.07	91.68	90.54	89.68	89.10	88.95	88.88
70	75	98.80	96.32	94.05	92.02	90.23	88.72	87.48	86.54	85.90	85.73	85.65
71	76	96.72	94.04	91.58	89.38	87.43	85.78	84.42	83.39	82.69	82.50	82.41
72	77	94.75	91.85	89.20	86.80	84.68	82.88	81.40	80.26	79.49	79.28	79.18
73	78	92.89	89.78	86.90	84.30	82.00	80.03	78.41	77.17	76.33	76.09	75.97
74	79	91.16	87.81	84.72	81.90	79.40	77.25	75.49	74.13	73.20	72.93	72.80
75	80	89.55	85.98	82.65	79.60	76.89	74.55	72.62	71.13	70.12	69.83	69.68

Reference should be made to Section 13 of Article V to determine the application of the rates shown above.

Rates for other attained ages will be furnished by the Company on request of the Employer.

20CC Graded to NS MF Imm

D-16502

TABLE 5a
ARTICLE VI
Amendment effective January 1, 1968

TABLE 6a

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF IMMEDIATE ANNUITIES CERTAIN IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III WHEN A CERTAIN AND CONTINUOUS OPTION IS IN EFFECT.

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicabale in the calendar year 1969 will be increased ½% over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased ½% over the rates for the immediately preceding calendar year.

Amount of Consideration Required on account of the Beneficiary of an Employee in one sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase an Immediate Annuity Certain, the Yearly Amount of which is $10.

Number of Years for which payments are to be made	Consideration
0	$ 5.05
1	14.79
2	24.06
3	32.90
4	41.31
5	49.32
6	56.95
7	64.22
8	71.14
9	77.73
10	84.01
11	89.99
12	95.68
13	101.11
14	106.27
15	111.19

16	115.88
17	120.34
18	124.59
19	128.63
20	132.49

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Reference should be made to Section 13 of Article V to determine the correct rate to use.

TABLE 7a

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF AN IMMEDIATE TEMPORARY ANNUITY IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 OF ARTICLE III

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicable in the calendar year 1969 will be increased ½% over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased ½% over the rates for the immediately preceding calendar year.

These Amounts Apply to an Employee Whose Social Security Commencement Date is the first day of the Month Coincident with or Next following his Sixty-Fifth Birthday.

Amount of Consideration Required on account of an Employee in one sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase a Temporary Annuity, the yearly amount of which is $10.

Attained Age of Employee	No Death Benefit	Ratio of Death Benefit to Retirement Annuity of a Male Employee 0	1	2	3	4	5	6	7
55	$74.11	$74.13	$74.21	$74.39	$74.65	$75.01	$75.47	$76.02	$76.68
56	67.99	68.01	68.10	68.29	68.58	68.97	69.47	70.07	70.77
57	61.56	61.58	61.68	61.89	62.20	62.62	63.16	63.81	64.57
58	54.79	54.82	54.92	55.15	55.48	55.94	56.52	57.22	57.22
59	47.65	47.68	47.80	48.04	48.40	48.90	49.52	49.52	49.52
60	40.12	40.15	40.27	40.53	40.93	41.46	41.46	41.46	41.46
61	32.14	32.17	32.31	32.59	33.02	33.02	33.02	33.02	33.02
62	23.68	23.72	23.86	24.17	24.17	24.17	24.17	24.17	24.17
63	14.67	14.73	14.89	14.89	14.89	14.89	14.89	14.89	14.89
64	5.12	5.00	5.00	5.00	5.00	5.00	5.00	5.00	5.00
65	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

TABLE 7a
ARTICLE VI
Amendment effective January 1, 1968

Attained Age of Employee	No Death Benefit	Ratio of Death Benefit to Retirement Annuity of a Female Employee 0	1	2	3	4	5	6	7
50	$102.91	$102.91	$102.94	$103.00	$103.10	$103.23	$103.40	$103.61	$103.87
51	97.88	97.89	97.92	97.99	98.10	98.25	98.44	98.68	98.96
52	92.63	92.64	92.68	92.76	92.88	93.04	93.26	93.52	93.84
53	87.14	87.15	87.20	87.28	87.42	87.60	87.84	88.14	88.49
54	81.40	81.41	81.46	81.56	81.71	81.92	82.18	82.51	82.90
55	75.39	75.40	75.45	75.56	75.73	75.96	76.25	76.61	77.04
56	69.09	69.10	69.16	69.28	69.46	69.72	70.04	70.44	70.91
57	62.47	62.49	62.55	62.69	62.89	63.17	63.52	63.96	64.47
58	55.53	55.54	55.62	55.76	55.99	56.29	56.68	57.15	57.15
59	48.22	48.24	48.32	48.48	48.72	49.06	49.48	49.48	49.48
60	40.53	40.55	40.63	40.81	41.07	41.43	41.43	41.43	41.43
61	32.41	32.43	32.52	32.71	33.00	33.00	33.00	33.00	33.00
62	23.23	23.85	23.95	24.16	24.16	24.16	24.16	24.16	24.16
63	14.74	14.77	14.88	14.88	14.88	14.88	14.88	14.88	14.88
64	5.11	5.00	5.00	5.00	5.00	5.00	5.00	5.00	5.00
65	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

TABLE 7a
ARTICLE VI
Amendment effective January 1, 1968

Reference should be made to Section 13 of Article V to determine the correct age and ratio to use in the application of the rates shown above.

When the ratio of death benefit to Retirement Annuity exceeds 7, rates will be furnished by the Company when necessary.

RS-n MF Imm. T65
D-16502

TABLE 7a — Continued

RATES OF CONSIDERATIONS APPLICABLE TO THE PURCHASE OF AN IMMEDIATE TEMPORARY ANNUITY IN ACCORDANCE WITH SECTION 7 OF ARTICLE III AND TO THE DETERMINATION OF THE LIABILITIES OF THE FUND IN ACCORDANCE WITH SECTION 2 of ARTICLE III

The rates applicable in the calendar year 1968 shall be the rates shown below. The rates applicable in the calendar year 1969 will be increased ½ % over the rates for 1968, and the rates applicable in each subsequent calendar year will be increased ½ % over the rates for the immediately preceding calendar year.

These Amounts Apply to an Employee Whose Social Security Commencement Date is the first day of the Month coincident with or next following his Sixty-Second Birthday.

Amount of Consideration required on account of an Employee in one sum in accordance with Sections 2 and 7 of Article III to Provide or Purchase a Temporary Annuity, the yearly amount of which is $10.

TABLE 7a
ARTICLE VI

Attained Age of Employee	No Death Benefit	Ratio of Death Benefit to Retirement Annuity of a Male Employee							
		0	1	2	3	4	5	6	7
55	$55.26	$55.28	$55.36	$55.54	$55.80	$56.16	$56.62	$57.18	$57.18
56	48.02	48.04	48.13	48.32	48.61	49.00	49.49	49.49	49.49
57	40.38	40.40	40.50	40.71	41.02	41.44	41.44	41.44	41.44
58	32.31	32.34	32.45	32.67	33.01	33.01	33.01	33.01	33.01
59	23.78	23.80	23.92	24.16	24.16	24.16	24.16	24.16	24.16
60	14.73	14.76	14.88	14.88	14.88	14.88	14.88	14.88	14.88
61	5.12	5.00	5.00	5.00	5.00	5.00	5.00	5.00	5.00
62	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Attained Age of Employee	No Death Benefit	Ratio of Death Benefit to Retirement Annuity of a Female Employee							
		0	1	2	3	4	5	6	7
50	$87.93	$87.94	$87.97	$88.03	$88.12	$88.25	$88.42	$88.63	$88.89
51	82.11	82.12	82.15	82.22	82.33	82.47	82.67	82.90	83.19
52	76.01	76.02	76.06	76.14	76.26	76.42	76.64	76.90	77.22
53	69.62	69.63	69.68	69.76	69.90	70.08	70.32	70.62	70.97
54	62.92	62.93	62.98	63.08	63.23	63.44	63.70	64.03	64.42
55	55.89	55.90	55.95	56.06	56.23	56.46	56.76	57.12	57.12
56	48.50	48.51	48.57	48.69	48.88	49.13	49.45	49.45	49.45
57	40.72	40.74	40.80	40.93	41.14	41.42	41.42	41.42	41.42
58	32.53	32.55	32.62	32.77	32.99	32.99	32.99	32.99	32.99
59	23.89	23.91	23.99	24.15	24.15	24.15	24.15	24.15	24.15
60	14.77	14.79	14.87	14.87	14.87	14.87	14.87	14.87	14.87
61	5.11	5.00	5.00	5.00	5.00	5.00	5.00	5.00	5.00
62	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Reference should be made to Section 13 of Article V to determine the correct age and ratio to use in the application of the rates shown above.

When the ratio of death benefit to Retirement Annuity exceeds 7, rates will be furnished by the Company when necessary.

RS-n MF Imm. T62
D-16502

TABLES 2b, 3b, 4b, 5b, 6b, and 7b

Tables 2b, 3b, 4b, 5b, 6b and 7b are analogous to Tables 2a, 3c, 4a, 5a, 6a and 7a, respectively. Values are not shown in the Contract, but will be supplied if necessary.

The rates will be determined in the following manner:

Retirement Annuities purchased on the July, 1938 and on the March 1941 rate basis:

The 1937 Standard Annuity Table (Males) unrated for males and rated at an age five years younger for females, with no loading, and interest at 2½%.

Retirement Annuities purchased on the October, 1959 Rate Basis:

The Group Annuity Table of 1951 (Males), projected to 1959 by Scale C and rated at an age one year younger for males and six years younger for females, with no loading, and interest at 3%.

TABLES 2c, 4c, 5c, 6c and 7c

Tables 2c, 4c, 5c, 6c and 7c are analogous to Tables 2a, 4a, 5a, 6a and 7a, respectively. Values are not shown in the Contract, but will be supplied if necessary.

The rates will be determined in the following manner;

The Considerations computed on the basis of the Group Annuity Table for 1951 (Males), projected to 1959 by Scale C and rated at an age one and one-half years younger for males and six and one-half years younger for females, with a 3% loading, and interest at 3%.

ARTICLE VI

AMENDMENT to be attached to and made a part of
Group Annuity Contract No. 50 GAC issued by the
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective April 1, 1969, the following modifications and alterations are hereby made in the conditions and provisions of this Contract:

1. ARTICLE I. DEFINITIONS. The following changes are made in this Article:

   In Definition 12 the following sentence is added to the end of and made a part of this Definition:

   "The term 'Restricted Portion' means that portion of the Pension Administration Fund in which payments made by the Employer in accordance with the Post-Retirement Medical Benefits Plan are to be accumulated."

   In Definition 17 the words "in excess of the Restricted Portion" are inserted immediately following the words "amount in the Pension Administration Fund".

2. ARTICLE III. CONSIDERATIONS. The following changes are made in this Article:

   Section 1. Contributions to the Pension Administration Fund and the Supplemental Fund. The following changes are made in this Section:

   The following changes are made in the portion of the first paragraph described as "Minimum Limitations":

   In item (i) the words "in excess of the Restricted Portion" are inserted immediately following the words "the amount in the Fund".

In item (ii) the words "in excess of the Restricted Portion" are inserted immediately following the words "the amounts in the Fund".

The following paragraph is added immediately following the fourth paragraph of this Section:

"In addition to amounts added to the Fund in accordance with the third paragraph of this Section, the Employer may make additional payments during each Contract Year to the Restricted Portion of the Fund in amounts determined by the Employer in accordance with the Post-Retirement Medical Benefits Plan and agreed to by the Company."

Section 2. Pension Administration Fund. The following changes are made in this Section:

In the second sentence of the first paragraph the words "in excess of the Liabilities of the Fund" are stricken out and the words "in excess of the sum of the Liabilities of the Fund and the Restricted Portion" are substituted therefor.

In the second sentence of the second paragraph in the two instances in which they appear the words "exceed the Liabilities of the Fund" are stricken out and the words "exceed the sum of the Liabilities of the Fund and the Restricted Portion" are substituted therefor.

In the third sentence of the second paragraph the words "the Company determines that the amount in the Fund and" are stricken out and the words "the Company determines that the amount in the Fund in excess of the Liabilities of the Fund and the Restricted Portion plus" are substituted therefor.

In the third sentence of the second paragraph the words "then a contribution sufficient to make the amounts in the Fund and in the" are stricken out and the words "then a Contribution sufficient to make the amounts in the Fund in excess of the Liabilities of the Fund and the Restricted Portion plus" are substituted therefor.

The following item is added to and made a part of the third paragraph:

"(e) Upon receipt by the Company at its Home Office of written notice from the Employer that an employee has retired and is entitled to benefits under the Post-Retirement Medical Benefits Plan the Company will deduct from the Restricted Portion, to the extent it is sufficient, the amount requested by the Employer and shall pay such amount to the insurance company or trustee as directed by the Employer. Any such payment shall fully discharge any and all liability of the Company with respect to such deduction from the Restricted Portion of the Fund."

Section 7. Discontinuance of Payment of Contributions and Termination of the Pension Administration Fund. The following changes are made in this Section:

In item (a) of the third paragraph the words "exceed the Liabilities of the Fund." are stricken out and the words "exceed the sum of the Liabilities of the Fund and the Restricted Portion."

The following is added to the end of the fourth and sixth paragraphs:

"The Restricted Portion, if any, shall be deducted from the Fund and the Company shall pay or apply such amount in a manner to be determined by mutual agreement between the Employer and the Company."

The following paragraph is added to the end of this Section:

"If at the time the Employer advises the Company that all benefits to be provided under the Post-Retirement Medical Benefits Plan have been provided there is a balance remaining in the Restricted Portion, the Company shall pay such amount to the Employer."

Section 9. Transfer of Pension Administration Fund. The following changes are made in this Section:

The following sentence is added to the end of and made a part of the ninth paragraph:

"The provisions of this Section may also apply separately to the Restricted Portion of the Fund."

The following change is made in the first sentence of the tenth paragraph:

The words "in excess of the Restricted Portion" are inserted immediately following the words "Transferable Balance from the Fund."

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ Kenneth F. Mac Iver, Secretary

Date: October 27, 1970

Countersigned by:

/s/ Thomas H. Hogan Jr.

Registrar

New York, New York

SPERRY RAND CORPORATION

Date: June 12, 1970

By /s/ [name illegible]

Vice President & Treasurer

AMENDMENT to be attached to and made a part of Group Annuity Contract No. 50 GAC issued by the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective April 3, 1969, the following modifications and alterations are hereby made in Section 6 of Article IV of this Contract:

In sub-section A. of I the words "the employee may elect one of the following Options:" are stricken out and the following is substituted therefor:

"the employee may elect one of the following options; provided, however, item 2 of (a) will be applicable only in the case of an employee of the Ford Instrument Division of Sperry Rand Corporation whose Termination of Employment Date occurs subsequent to April 3, 1969 for reasons other than death or transfer, as determined by the Retirement Committee and who on or before such Termination of Employment Date meets the vesting requirements described in (i) or (ii) of (b) below:"

Item (a) of sub-section A. of I is cancelled and annulled and the following is substituted therefor.

"(a) 1. A cash surrender value equal to his Employee's Accumulation.

2. A cash surrender value equal to his Employee's Accumulation. Such employee shall be entitled also to have a yearly amount of Normal Retirement Annuity provided for him on his Normal Retirement Date equal to the excess of (i) over (ii) below.

(i) The yearly amount of Normal Retirement Annuity purchased on his account which was cancelled on January 1, 1968.

(ii) The yearly amount of Normal Retirement Annuity which could be provided on the basis of Table 1 of Article VI by his Employee's Accumulation on his Normal Retirement Date."

Item (ii) of (b) of sub-section A. of I is cancelled and the following is substituted therefor:

"(ii) met the vesting requirements as determined by the Retirement Committee in accordance with the Plan,

the yearly amount of Normal Retirement Annuity to be provided shall be equal to the yearly amount of Normal Retirement Annuity purchased on his account which was cancelled on January 1, 1968."

In the second paragraph of sub-section C. of I the words "to his beneficiary." are stricken out and the following is substituted therefor:

"to his beneficiary, unless item 2. of (a) of sub-section A. was applicable on his Termination of Employment Date."

APPROVED
STATE OF NEW YORK
Date
Illegible

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ Kenneth F. Mac Iver, Secretary

Date: February 26, 1971

Countersigned by

/s/ Thomas H. Hogan Jr
Registrar

New York, New York

SPERRY RAND CORPORATION

Date: December 3, 1970

By /s/ [name illegible]
Vice President and Treasurer

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

AMENDMENT to be attached to and made a part of Group Annuity Contract No. 50 GAC issued by the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY covering certain employees of

SPERRY RAND CORPORATION

WHEREAS, certain employees of the Employer employed by the Sperry Gyroscope Division and Sperry Systems Management Division of Sperry Rand Corporation included under the Sperry Rand Retirement Program on June 30, 1970 will become represented by the Engineers Union (IUE) on July 1, 1970, and

WHEREAS, the Employer desires that such employees be included under Group Annuity Contract No. 1150 GAC issued by the Company to the Employer,

NOW THEREFORE, it is understood and agreed that, effective July 1, 1970, all liability with respect to Retirement Annuities in effect hereunder on account of such employees who are in the active employ of the Employer on such date, is transferred to Group Annuity Contract No. 1150 GAC. An amount, as determined by the Employer, equal to the sum of (i) a portion of the amount of the Liabilities of the Fund attributable to the Retirement Annuities so transferred, (ii) a portion of the "Restricted Portion" of the fund attributable to such employees and (iii) a portion of the balance in the fund, if any, of the excess of the Liabilities of the Fund and the Restrictive Portion of the Fund attributable to such employees, shall be transferred to the Pension Administration Fund under Group Annuity Contract No. 1150 GAC. A portion, as determined by the Employer, of the Supplemental Fund attributable to such employees shall be transferred to the Supplemental Fund under Group Annuity Contract No. 1150 GAC. A portion, as determined by the Company of the Contingency Account attributable to the Retirement Annuity so transferred, shall be transferred to Group Annuity Contract No. 1150 GAC. The Company shall have no liability hereunder with respect to the amounts so transferred.

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ Kenneth F. Mac Iver, Secretary

Date: February 8, 1971

Countersigned by:

/s/ Thomas H. Hogan Jr.
Registrar

New York, New York

SPERRY RAND CORPORATION

Date: December 31, 1970

By /s/ [name illegible]
Vice President and Treasurer

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

AMENDMENT to be attached to and made a part of
Group Annuity Contract No. 50 GAC issued by the
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective January 1, 1975, the following modifications and alterations are hereby made in the conditions and provisions of ARTICLE III of this Contract:

The title of this ARTICLE is changed to "ARTICLE III CONTRIBUTIONS".

SECTION 4. Payment of Contributions. The following paragraph is inserted immediately following the first paragraph:

"Notwithstanding anything contained herein to the contrary, any Contribution required or permitted to be paid hereunder by the Employer may be made on behalf of the Employer by another insurance company or trustee funding all or a portion of the benefits provided under the Plan. Payment made by another insurance company or trustee shall be regarded for all purposes of this Contract as if made by the Employer. Such other insurance company or trustee shall not be a party to this Contract and shall have no interest therein. The Company shall be under no obligation in event of failure of such other insurance company or trustee to pay any Contribution required of the Employer in accordance with the terms of this Contract or in event of any failure by the Employer to furnish any directions to another insurance company, it being understood and agreed that this paragraph shall not diminish or change the responsibility of the Employer for any action required by it under this Contract."

SECTION 10. Supplemental Fund: Item (ii) of Sub-section D. of this Section is cancelled and annulled and the following is substituted therefor:

"(ii) *Transfer to Another Insurance Company or Trustee*

The Company will, upon notice from the Employer, withdraw a portion of or the entire balance in the Supplemental Fund after making all adjustments thereto on or before the date of withdrawal in accordance with sub-section B of this Section, and pay such amount to an insurance company or trustee, designated by the Employer, provided such notice also specifies the three conditions set forth in the first paragraph of Section 9 of this Article.

Notwithstanding anything contained herein to the contrary, discontinuance of payment of Contributions shall be deemed to have occurred on the first day of the calendar month next following the transfer of the entire balance of the Supplemental Fund to another insurance company or trustee in accordance with this Section, unless the Company and the Employer agree otherwise, in writing, prior to the date of such transfer."

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY

/s/ J.G. McElwee, Secretary

Date: September 10, 1975

Form 100-50 GAC-14 Amendment effective January 1, 1975

Countersigned by:

/s/ Michael B. O'Toole
Registrar

New York, New York SPERRY RAND CORPORATION

Date: July 29, 1975 By /s/ [name illegible]
Assistant Treasurer

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

AMENDMENT to be attached to and made a part of Group Annuity Contract No. 50 GAC issued by the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective June 30, 1976, the following modifications and alterations are hereby made in the conditions and provisions of this Contract:

1. Cover Page: The fourth paragraph is cancelled and annulled and the following paragraph is substituted therefor:

   "Payment made to the Separate Funds shall participate directly in the investment experience of the Separate Funds in Separate Investment Account Number 18."

2. ARTICLE I: The following changes are made in this ARTICLE:

   Definition 11. The following sentence is added to and made a part of this Definition:

   "At the time each such Contribution is made to the Company the Sperry Rand Retirement Committee shall advise the Company as to the portion of such Contribution to be added to the Pension Administration Fund and the portion to be added to Separate Investment Account Number 18."

   Definition 13. The following is added to and made a part of this Definition:

   "On June 30, 1976, the balance in the Supplemental Fund shall be transferred to Separate Investment Account Number 18 in such manner and amounts as may be mutually agreed upon between the Company and the Sperry Rand Retirement Committee. On the date of such transfer the Supplemental Fund shall cease to exist."

Definition 14. Effective June 30, 1976, this Definition is cancelled and annulled and the following is substituted therefor:

"Definition 14. Separate Investment Account Number 18. Separate Investment Account Number 18 means the Separate Investment Account maintained by the Company, in accordance with applicable law, for this Contract and for Group Annuity Contracts No. 1150GAC, No. 1151GAC, No. 1152GAC and No. 1153GAC issued by the Company to the Employer. Within Separate Investment Account Number 18, the Company shall establish and make available for use by the Sperry Rand Retirement Committee one or more investment classes to which Contributions under this Contract may be assigned. Wherever the term 'Separate Investment Account Number 18' is used in this Contract such term shall mean the portion of Separate Investment Account Number 18 which is attributable to this Contract, as determined by the Company."

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

The following definition is added immediately following Definition 14.

"Definition 14A 'Separate Fund' means any one of the investment classes which the Company shall establish and make available for use by the Sperry Rand Retirement Committee in Separate Investment Account Number 18 to which Contributions under this Contract may be assigned."

Definition 26. This definition is cancelled and annulled and the following is substituted therefor:

"Definition 26. The term 'Sperry Rand Retirement Committee' means the 'Named Fiduciary' or the 'Administrator', whichever is applicable, as described in the Plan. The Company shall be entitled to rely on notices, forms or other correspondence supplied by the Sperry Rand Retirement Committee or its delegated or authorized representatives as reported to the Company from time to time. The Company shall be liable only for the obligations contained in this Contract and shall have no responsibility whatsoever to ascertain the propriety of any action taken at any time by the Sperry Rand Retirement Committee. The Employer shall notify the Company of the names of the members of the Sperry Rand Retirement Committee and the Company shall be entitled to rely on signatures of those persons until such time as the Employer notifies the Company of changes in membership of the Sperry Rand Retirement Committee.

Wherever the term 'Retirement Committee' appears herein it shall be deemed to mean 'Sperry Rand Retirement Committee'."

3. ARTICLE III. CONTRIBUTIONS: The following changes are made in this ARTICLE:

SECTION 1. Contributions to the Pension Administration Fund and the Supplemental Fund: The heading of this Section is cancelled and annulled and the following heading is substituted therefor:

"SECTION 1. Contributions to the Group Annuity Contract"

The second and third paragraphs of this Section are cancelled and the following paragraphs are substituted therefor:

"The aggregate amount of Contributions to be paid to the Company by the Employer in each Contract Year or portion thereof on and after January 1, 1968 may, within the limitations set forth herein, be paid at such times during the Contract Year as the Employer determines.

Except as may otherwise be agreed to in writing between the Employer and the Company, the aggregate amount of Contributions to be paid to the Company by the Employer in each Contract Year or portion thereof on and after January 1, 1968 shall be as determined by the Employer within the limitations and subject to the conditions set forth herein. The aggregate amount of such Contributions, including amounts added to the Fund or the Separate Investment Account Number 18 during such Contract Year or portion thereof in accordance with Section 7 of Article V shall not exceed the amount specified below under the heading 'Maximum Limitation' and shall not be less than the amount specified below under the heading 'Minimum Limitation'.

Maximum Limitation

The sum of (i) twice the amount which the Company estimates is necessary for normal costs for such Contract Year on account of employees included under the Plan who have not attained their Annuity Commencement Dates at the commencement of such Contract Year, and (ii) 20% of any past service costs attributable to any increases in benefits to employees provided by amendments to the Plan and determined on the effective dates of each such amendment.

Minimum Limitation

The amount which the Company determines is necessary to increase the Fund and Separate Investment Account Number 18 so that

(i) the amount in the Fund in excess of the Restricted Portion will equal the Liabilities of the Fund at all times during such Contract Year, and

(ii) the amounts in the Fund in excess of the Restricted Portion and in Separate Investment Account Number 18 together will equal 105% of the Liabilities of the Fund at all times during such Contract Year.

As used in this paragraph

(iii) normal costs for any year are the current service costs applicable to such year of the Retirement benefits which the Company estimates may become payable under this Contract, and

(iv) past service cost at any time with respect to employees who have not attained their Annuity Commencement Dates is the amount which would be required at such time to meet the cost of all the retirement benefits which the Company estimates may become payable under this Contract to such employees and which would not be met by future normal costs."

SECTION 2. Pension Administration Fund: The following changes are made in this Section: The following changes are made in the first paragraph:

In the second sentence the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee or both, as applicable", are substituted therefor.

In the third sentence the words "Supplemental Fund" are stricken out and the words "Separate Investment Account Number 18." are substituted therefor.

The following changes are made in the second paragraph:

Wherever the words "Supplemental Fund" appear they are stricken out and the words "Separate Investment Account Number 18" are substituted therefor.

In the first sentence the word "Employer" is stricken out and the words "Sperry Rand Retirement Committee" are substituted therefor.

In the second and third sentences the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee or both, as applicable," are substituted therefor.

SECTION 3. Adjustments to the Pension Administration Fund: In the fourth paragraph the words "Supplemental Fund" are stricken out and the words "Separate Investment Account No. 18." are substituted therefor.

SECTION 6. Suspension of Payment of Contributions. In the first paragraph of this Section wherever the words "Supplemental Fund" appear they are stricken out and the words "Separate Investment Account Number 18" are substituted therefor.

SECTION 7. Discontinuance of Payment of Contributions and Termination of the Pension Administration Fund: The following changes are made in this Section:

In the third, sixth and eighth paragraphs of this Section wherever the words "Supplemental Fund" appear they are stricken out and the words "Separate Investment Account Number 18" are substituted therefor.

The following changes are made in the third paragraph:

In the wording immediately preceding item (a) the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee, as applicable," are substituted therefor.

In item (a) the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee, as applicable," are substituted therefor.

In item (c) the word "Employer" is stricken out and the words "Sperry Rand Retirement Committee" are substituted therefor.

In the third sentence of the fifth paragraph the word "Employer" is stricken out and the words "Sperry Rand Retirement Committee" are substituted therefor.

In the sixth paragraph the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee or both, as applicable," are substituted therefor.

In the eighth paragraph in the two instances in which the word "Employer" appears it is stricken out and the words "Sperry Rand Retirement Committee" are substituted therefor.

In the second sentence of the ninth paragraph the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee or both, as applicable," are substituted therefor.

SECTION 8. Continuation of Plan with Another Carrier: The following changes are made in this Section:

In the first paragraph the words preceding item (a) are stricken out and the following is substituted therefor.

"If within ninety days following the discontinuance of the payment of Contributions in accordance with Section 7 of this Article the Company receives written notice at its Home Office from the Employer or the Sperry Rand Retirement Committee, as applicable, specifying"

In item (c) the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee, as applicable," are substituted therefor.

The following changes are made in the second paragraph:

In item (d) the word "Employer" in the first instance in which it appears is stricken out and the following is substituted therefor:

"Employer or the Sperry Rand Retirement Committee, as applicable,"

In item (e) the word "Employer" in the second instance in which it appears is stricken out and the words "Employer or the Sperry Rand Retirement Committee, as applicable," are substituted therefor.

SECTION 9. Transfer of Pension Administration Fund. The following changes are made in this Section:

The following changes are made in the first paragraph:

The words immediately preceding item (a) are stricken out and the following is substituted therefor:

"If the Employer or the Sperry Rand Retirement Committee, as applicable, files with the Company at its Home Office written notice specifying"

In item (c) the word "Employer" is stricken out and the words "Employer or the Sperry Rand Retirement Committee, as applicable," are substituted therefor.

In the second, fifth, ninth and eleventh paragraphs the word "Employer" is stricken out and the following is substituted therefor:

"Sperry Rand Retirement Committee"

In the seventh paragraph in the two instances in which the word "Employer" appears it is stricken out and the words "Sperry Rand Retirement Committee" are substituted therefor.

The following changes are made in the tenth paragraph:

In the first sentence the word "Employer" is stricken out and the following is substituted therefor:

"Sperry Rand Retirement Committee"

In the first sentence the words "Supplemental Fund" are stricken out and the words "Separate Investment Account Number 18" are substituted therefor.

In the twelfth paragraph wherever the word "Employer" appears it is stricken out and the following is substituted therefor:

"Sperry Rand Retirement Committee"

SECTION 10. Supplemental Fund: This Section is cancelled and annulled and the following is substituted therefor:

"SECTION 10. Separate Funds

The Sperry Rand Retirement Committee may establish a Separate Fund in each of the Investment classed offered by the Company in Separate Investment Account Number 18. The Company may, from time to time, offer new investment classes and may withdraw existing investment classes with respect to future Contributions.

The Sperry Rand Retirement Committee shall, in a written notice, specify the Separate Funds to be maintained under this Contract and the portion of the Contributions to be added to each Separate Fund. Such instructions may be changed from time to time by the Sperry Rand Retirement Committee by filing written notice with the Company at least 90 days before the change is to be effective.

The balance in each Separate Fund on any date is equal to the sum of all additions to the fund less all withdrawals from the fund as described below.

Additions to a Separate Fund consist of Contributions added to the fund, transfers to the fund, and adjustments for investment income. Withdrawals from a Separate Fund consist of amounts withdrawn from the fund for transfer out of the fund and adjustments withdrawn for expenses including taxes and capital losses.

Contributions. The Sperry Rand Retirement Committee shall determine the portion of the aggregate amount of

Contributions paid to the Company by the Employer in each Contract Year to be included in each Separate Fund exclusive of amounts transferred from the Supplemental Fund, subject to the limitations that the total amount of Contributions to be added to all such Separate Funds in each such Contract Year shall not exceed the maximum amount which could be paid into the Pension Administration Fund.

Contributions added to the Separate Funds shall be in addition to and separate from the Contributions added to the Pension Administration Fund.

Adjustments on Account of Investment Experience and Expenses Including Taxes. As of the last business day of each month, the Company shall make adjustments to each of the Separate Funds in the manner described below for the investment income, capital gains and losses, and expenses including taxes to be added to or withdrawn from the fund for such month. In lieu of making adjustments as of the last business day of each month, adjustments may be made on other dates as determined by the Company. The amount of each adjustment on account of investment experience and expenses including taxes shall be determined by the Company in accordance with its regular procedure applicable to contracts of this class and in effect at the time such adjustments are to be made. Any such determination shall be conclusive for the purposes of this Contract.

For the purposes of allocating the investment experience of Separate Investment Account Number 18 to the Separate Funds, each investment class within the Separate Investment Account Number 18 will be valued at the end of each month on the basis of the market value of the individual assets held in such account. If there is no readily available market value of the individual assets, the Company will determine a fair value in accordance with generally accepted practices.

Investment Income. Adjustments made for the investment income to be added to each Separate Fund as of the last business day of each month shall be equal to the Separate Fund's share, after providing for any specific charges made by the Company against such income for all contracts of this class, of the net investment income for such month.

Capital Gains and Losses. Adjustments made to each Separate Fund for the capital gains and losses, realized and unrealized, as the case may be, on the last business day of each month shall, except as noted below, be the Separate Fund's share of the capital gains and losses, after providing for any specific charges or credits made by the Company against such capital gains and losses, realized and unrealized, for such month.

Expenses. Adjustments made for expenses including taxes to be withdrawn from each Separate Fund as of the last business day of each month shall be the Separate Fund's share of the expenses including taxes for such month, as determined by the Company in accordance with its regular procedures applicable to Separate Funds included in other contracts issued by the Company which fall in the same classification as this Contract and which are in effect at the time such determination is made, and such determination shall be conclusive for the purposes of this Contract.

In determining the adjustments to the Separate Funds as of any date, the Company may estimate the amount of such adjustments. Correcting charges or credits shall be made to such estimated adjustments by the Company as soon as practicable provided, however, any estimated adjustments used in determining the balance in any Separate Fund on the date the fund ceases to exist shall be conclusive for the purposes of this Contract and shall not be subject to modification.

SECTION 11. Transfer of Separate Funds

Amounts may be transferred

(a) from the Separate Funds to the Pension Administration Fund

(b) from the Separate Funds to another insurance company or trustee, designated by the Sperry Rand Retirement Committee, provided such notice also specifies the three conditions set forth in the first paragraph of Section 9 of this Article,

(c) between two or more Separate Funds

upon written notice from the Sperry Rand Retirement Committee specifying the Transfer Date, the amount to be transferred and the Separate Funds from which the transfer is to be made. Any such transfer shall be subject to the following conditions:

1. Unless otherwise alternatively agreed upon between the Sperry Rand Retirement Committee and the Company, the Transfer Date must be at least 30 days subsequent to the date of receipt by the Company of the written notice for any transfer to be made from a Separate Fund comprised predominantly of common stock investments, and at least 90 days subsequent to receipt by the Company of the written notice for transfers from any other Separate Funds.

2. The maximum amount which may be transferred from the Separate Funds to the Pension Administration Fund in any Contract Year shall be an amount then to be paid to the Pension Administration Fund in accordance with Section 1 of this Article. Transfers of amounts in excess of this limit shall

be subject to the consent of the Company and shall be subject to such Rate Tables as the Company shall determine.

3. Transfers shall normally be made as of the last business day of the month except that transfers may be deferred by the Company for a reasonable period of time in order for the Company to complete the necessary computations and arrangements for making the transfers, and may be deferred when banking activities have been suspended, when security exchanges are closed, when there is restricted trading on any stock exchange, or when an emergency or other circumstance beyond the control of the Company exists and as a result of which disposal of securities is impractical, or the Company cannot fairly determine the value of assets in the Separate Funds.

   If the Company determines that the amount and character of any securities which are to be liquidated in order to make the transfers in cash cannot be liquidated without undue sacrifice, it may defer making the transfers for such period as it determines necessary, or upon request of the Sperry Rand Retirement Committee, the Company shall determine the securities which would be liquidated for any such transfer, and transfer such securities. No transfer of securities will be made, however, except as permitted by the applicable laws of the State of New York and the Commonwealth of Massachusetts.

4. A portion or all of the amount in the Separate Funds may be transferred from the Separate Funds to another insurance company or trustee which is funding benefits under the Plan or any successor or substitute plan which in the opinion of the

Sperry Rand Retirement Committee meets the applicable requirements of Section 401 of the Internal Revenue Code of 1954 or acts amending or replacing such Section."

In addition to any transfers in accordance with the foregoing provisions, if on any date the payment of a Contribution by the Employer is required in accordance with Section 1 of this Article, then, unless the Employer pays such Contribution, the Company shall have the right in its sole discretion to transfer an amount equal to such required Contribution from the Separate Funds to the Pension Administration Fund. Transfer of such amount shall be considered for the purposes of Section 1 of this Article as a payment by the Employer of the required Contribution. The Company shall, unless the Sperry Rand Retirement Committee has previously notified the Company in writing directing that transfers be made from designated Separate Funds, determine the Separate Fund or Funds from which such transfer is to be made.

SECTION 11. Maximum Considerations Applicable to Certain Employers: This Section is renumbered "SECTION 12."

4. ARTICLE V. GENERAL PROVISIONS: The following changes are made in this ARTICLE:

SECTION 7. Participation in Divisible Surplus: The last sentence of this Section is cancelled and annulled and the following is substituted therefor:

"In lieu of such credit to the Pension Administration Fund, the Sperry Rand Retirement Committee may direct, in a written notice filed with the Company, at its Home Office, that any such divisible surplus be placed in whole or in part in Separate Investment Account Number 18."

SECTION 8. Modification of This Contract: The second sentence of the fifth paragraph of this Section is cancelled and annulled.

SECTION 11. Funds under This Contract: The second sentence of the sole paragraph of this Section is cancelled and annulled and the following is substituted therefor:

"Separate Investment Account Number 18 and all monies therein shall be assigned to the Separate Investment Account of the Company."

SECTION 12. Management of Separate Investment Account: This Section is cancelled and annulled and the following is substituted therefor:

"SECTION 12. Management of Separate Investment Account Number 18.

The Company shall be the sole owner of the assets in and shall have the sole right to control, manage, and administer Separate Investment Account Number 18, and each investment class it establishes within such account and may take any action which, in its judgment, is necessary or desirable for carrying out its duties in connection therewith, including but not limited to the right:

(a) to invest and reinvest all monies attributable to an investment class in such securities of any kind or character which the Company, in its sole discretion, may select consistent with the investment policy established by the Company for such investment class;

(b) to sell, convey, transfer, exchange and otherwise dispose of property from time to time in such manner and upon such terms as the Company, in its sole discretion, may determine;

(c) to retain in cash without liability for interest such funds as the Company shall deem reasonable; and

(d) to establish and withdraw (with respect to future Contributions as stated in the first paragraph of Section 10 of Article III) any investment class or classes within Separate Investment Account Number 18.

The Employer or the Sperry Rand Retirement Committee, as applicable, shall have no individual ownership in or to any investments or assets in Separate Investment Account Number 18 and neither the allocation to this Contract of a pro rata share of monies in an investment class or classes nor the records and accounts kept in connection therewith shall be deemed to confer any ownership."

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ J.G. McElwee, Secretary

Date: June 29, 1976

Countersigned by

/s/ Michael B. O'Toole

New York, New York

SPERRY RAND CORPORATION

Date: June 1, 1976

By /s/ [name illegible]
Assistant Treasurer

Form 100-50 GAC-15 Amendment effective June 30, 1976

AMENDMENT to be attached to and made a part of Group Annuity Contract No. 50 GAC issued by the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective January 1, 1976, the following modification and alteration is hereby made in the conditions and provisions of this Contract:

ARTICLE III-SECTION 7. Discontinuance of Payment of Contributions and Termination of the Pension Administration Fund: The following change is made in the first paragraph of this Section:

Item (v) is cancelled and annulled.

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
/s/ J.G. McElwee, Secretary

Date: September 22, 1976

Countersigned by:

/s/ Michael B. O'Toole
Registrar

New York, New York

SPERRY RAND CORPORATION

Date: July 30, 1976

By /s/ [name illegible]
Assistant Treasurer

Form 100-50 GAC-16 Amendment effective January 1, 1976

AMENDMENT to be attached to and made a part of
Group Annuity Contract No. 50 GAC issued by the
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
covering certain employees of
SPERRY RAND CORPORATION

It is understood and agreed that, effective August 1, 1977, the following modifications and alterations are hereby made in the conditions and provisions of this Contract:

1. Cover Page:

   The words "Prospective Deferred Liability" are added to the lower right corner of the cover page immediately below the words "Pension Administration Fund with Supplemental Fund".

2. ARTICLE I. Definitions

   The following changes are made in this Article:

   Definition 3. Retirement Annuity

   The words ", other than a Non-guaranteed Benefit," are added immediately following the words "means the Annuity" in the first sentence of this Definition.

   Definition 20. Termination of Employment

   The words ", or Benefit Commencement Date," are added immediately following the words "Annuity Accrual Date" in the sole sentence of this Definition.

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

Definition 21. Employee

The words ", or Non-guaranteed Benefit," are added immediately following the words "Retirement Annuity" in the sole sentence of this Definition.

The following Definitions are added to this Article:

"27. 'Guaranteed Benefit' means the benefit, other than a Non-guaranteed Benefit, to which an employee or his designated survivor is entitled in accordance with the Plan as determined by the Retirement Committee and for which an amount is included in the Liability of the Fund in accordance with (b) of (B) of Section 2 of Article III.

If on any date after August 1, 1977, the Retirement Committee requests the Company to establish any Guaranteed Benefits in excess of the annuities canceled on January 1, 1968, with respect to certain employees and their designated survivors, such date and the form and yearly amount of such Guaranteed Benefit must be established in a manner which precludes selection on the basis of expected longevity as determined by the Company or on a mutually agreed upon basis with the Contract Holder.

28. 'Non-guaranteed Benefit' means the benefit accrued on and after January 1, 1968, other than a Guaranteed Benefit, to which an employee or his designated survivor is entitled in accordance with the Plan as determined by the Retirement Committee, which will be provided hereunder commencing on the Benefit Commencement Date of the employee provided notice that such Non-guaranteed Benefit payments are to be paid is received by the Company as its Home Office prior to such Benefit Commencement Date.

29. 'Benefit Commencement Date' of an employee means the first day of the month on or after August 1, 1977, on which the first Non-guaranteed Benefit payment will be made with respect to the employee. Such date shall be the date

the Retirement Committee notifies the Company that Non-guaranteed Benefit payments are to commence with respect to the employee.

In the event that an employee also has an Annuity Commencement Date occur with respect to him, such date shall be the same as his Benefit Commencement Date."

2. ARTICLE II. Dates of Coverage and Plan of Benefits

The following changes are made in this Article:

Section 1. Dates of Coverage

The following paragraph is added to this Section immediately following paragraph two and becomes paragraph three of this Section:

"On and after August 1, 1977, an employee included under the Plan shall also become covered under this Contract when a Non-guaranteed Benefit is provided for him. A Non-guaranteed Benefit shall be paid to an employee on his Benefit Commencement Date if he is then included under the Plan and if termination of the Fund has not previously occurred in accordance with the provisions of Section 7 of Article III."

The following Section is added to the end of and made a part of Article II:

"Section 3. Non-Guaranteed Benefits

The Retirement Committee shall notify the Company in writing of the Benefit Commencement Date of an employee in advance of such date, and shall furnish such other information with respect to the employee or his designated survivor as is necessary to provide the Non-guaranteed Benefit.

The monthly amount of Non-guaranteed Benefit to be provided hereunder for an employee shall be the amount to

which he is entitled on such date in accordance with the Plan as determined by the Retirement Committee. The determination of eligibility for and the amount of such Non-guaranteed Benefit shall be made solely by the Retirement Committee and the Company shall have no responsibility for such determination.

On and after the Benefit Commencement Date of an employee, the Non-guaranteed Benefit for such an employee or his designated survivor shall be payable hereunder in accordance with the Plan until the earliest of the date of his death, the date the Retirement Committee notifies the Company in accordance with Section 9 of Article IV that said Non-guaranteed Benefit payments are to be canceled, suspended or adjusted, or the date the Pension Administration Fund is not sufficient to provide the Non-guaranteed Benefits for the payee."

3. ARTICLE III. Contributions

The following changes are made in this Article:

Section 1. Contributions to the Group Annuity Contract

a. The words "or Benefit Commencement Dates" are added immediately following the words "Annuity Commencement Dates" in the sentence following the heading *Maximum Limitation*.

b. The words "and the amount of Non-guaranteed Benefits due" are added immediately following the words "Liabilities of the Fund" in item (i) of the first sentence following the heading *Minimum Limitation*.

c. The words "or Benefit Commencement Dates" are added immediately following the words "Annuity Commencement Dates" in item (iv) of the second sentence following the heading *Minimum Limitation*.

Section 2. Pension Administration Fund

a. The following heading is inserted immediately following the Section title:

"A. Applicable to Guaranteed Benefits"

b. The following paragraph and succeeding heading are added immediately following the second paragraph of this Section:

"B. Applicable to Non-guaranteed Benefits

On the Benefit Commencement Date of an employee and on each date thereafter on which a Non-guaranteed Benefit is due with respect to an employee on or before the date of termination of the Fund, a Non-guaranteed Benefit shall be provided hereunder with respect to each employee entitled thereto. The Company shall be liable for any amount of Non-guaranteed Benefit expressed to be payable only to the extent to which the Fund is sufficient to provide such amount.

C. Applicable to Guaranteed and Non-guaranteed Benefits"

c. The following item (f) is added immediately following item (e) under sub-section C. of this Section:

"(f) On each first day of the month the Company shall deduct from the Fund and pay to each employee or designated survivor, if any, covered hereunder for whom a Non-guaranteed Benefit becomes payable, the amount of Non-guaranteed Benefit due the employee in accordance with Section 3 of Article II."

Section 9. Transfer of Pension Administration Fund

The words "for all Non-guaranteed Benefits, and" are added to the end of item (i) of the next to last paragraph of this Section.

4. ARTICLE IV. Retirement Annuity Provisions

The following changes are made in this Article:

The title of this Article is changed to "ARTICLE IV. Provisions Pertaining to the Payment of Benefits".

Section 5. Death Benefit

The words ", and any Non-guaranteed Benefit paid to such employee or his designated survivor under the Contract on and after August 1, 1977" are added to the end of the second paragraph of this Section.

Section 6. Employee's Options on Termination of Employment

The following changes are made in this Section:

The words "and prior to August 1, 1977" are added to the heading of sub-section II of this Section.

The following sub-section is added to the end of this Section:

"III. Provisions Applicable to an Employee with Respect to Non-guaranteed Benefits provided on and after August 1, 1977

A. If the Benefit Commencement Date of an employee, with respect to whom a Termination of Employment Date has occurred, occurs on or after August 1, 1977, and prior to the date of discontinuance of the payment of Contributions hereunder in accordance with Section 7 of Article III and provided the employee meets the vesting requirements as determined by the Retirement Committee in accordance with the Plan, the employee may be entitled, commencing on his Benefit Commencement Date, to receive a Non-guaranteed Benefit as determined by the Retirement Committee in accordance with the Plan. The payment of any such Non-guaranteed Benefit payments shall also be made in accordance with the terms of the Contract subject to the sufficiency of the Fund.

B. If the Benefit Commencement Date of an employee, with respect to whom a Termination of Employment Date of the Employee has occurred, occurs on or after August 1, 1977, and on and after the date of discontinuance of the payment of Contributions hereunder in accordance with Section 7 of Article III, but prior to the termination of the Fund, and provided the employee meets the vesting requirements as determined by the Retirement Committee in accordance with the Plan, the employee may be entitled, commencing on his Benefit Commencement Date, to receive a Non-guaranteed Benefit as determined by the Retirement Committee in accordance with the Plan. The payment of any such Non-guaranteed Benefit payments shall also be

made in accordance with the terms of the Contract subject to the sufficiency of the Fund."

The following Section is added to the end of this Article:

"Section 9. Payment of Non-guaranteed Benefits

Non-guaranteed benefit payments shall be payable to a payee, provided the Pension Administration Fund is sufficient for the purpose, upon written notice from the Sperry Rand Retirement Committee to the Company. Such notice shall specify the payee's Benefit Commencement Date and the amount, form and manner of such Non-guaranteed Benefit payments. Non-guaranteed Benefit payments shall continue until

(a) the date of death of the payee,

(b) the date as of which the Retirement Committee notifies the Company, in accordance with the next paragraph, that such Non-guaranteed Benefit payments are to be canceled, suspended, or adjusted,

(c) the date as of which the Company, by written notice filed with the Retirement Committee at least thirty-one days prior thereto, declares its intention to cease such payments,

(d) the date the Pension Administration Fund ceases to exist.

The Retirement Committee shall have the right to notify the Company that Non-guaranteed Benefits provided under this Contract shall be canceled, suspended or adjusted on

and after the date specified by the Retirement Committee. Such notice must be in writing and be received by the Company at its Home Office prior to the date of cancellation, suspension or adjustment. On and after the date of cancellation or suspension specified in such notice, no further payments shall be made by the Company with respect to the Non-guaranteed Benefits provided for payees included in any cancellation notice or during the period of suspension for payees included in any suspension notice, and the Company shall have no responsibility with respect to any Non-guaranteed Benefits which may be canceled, or if Non-guaranteed Benefits are suspended, during the period of suspension. On and after the date of the adjustment specified in such notice, the liability of the Company with respect to the Non-guaranteed Benefits provided for payees included in such notice shall be equal only to the liability for the adjusted Non-guaranteed Benefits provided in such notice for such payees."

5. ARTICLE V. General Provisions

The following changes are made in this Article:

Section 5. Information to be Furnished - Misstatements

The following changes are made in this Section:

In the first sentence of the first paragraph of this Section, the words "or Non-guaranteed Benefit payments" are added immediately following the words "Retirement Annuity payments".

In the sole sentence of the third paragraph of this Section, the words "or the amount withdrawn from the Fund for the payment of any Non-guaranteed Benefits," are added immediately following the words "Liabilities of the Fund".

Section 6. Evidence of Survival

The words "or Non-guaranteed Benefit payment" are added to the first sentence of this Section immediately following the words "Retirement Annuity payment".

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ J.G. McElwee, Secretary

Date: Oct. 12, 1978

Countersigned by:

/s/ [name illegible]
Registrar

New York, New York

SPERRY RAND CORPORATION

Date: June 29, 1978

By /s/ [name illegible]
Assistant Treasurer

AMENDMENT to be attached to and made a part of
Group Annuity Contract No. 50 GAC issued by the
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective May 1, 1978, the following modifications and alterations are hereby made in the conditions and provisions of this Contract:

1. Cover Page: The following changes are made on the Cover Page:

The words "THE SPERRY CORPORATION, and SPERRY GYROSCOPE COMPANY, INC., FORD INSTRUMENT COMPANY, INC., VICKERS, INCORPORATED, SPERRY SECURITIES CORPORATION and SPERRY INVESTMENT CORPORATION (HEREINAFTER CALLED THE EMPLOYER)"

are hereby deleted and the following substituted therefor:

"THE CHASE MANHATTAN BANK, N.A.
as TRUSTEE OF THE SPERRY RAND
MASTER RETIREMENT TRUST NO. 2
(hereinafter called the Contract Holder)"

In the first paragraph the word "Employer" is stricken out in the second instance it appears and the words "Contract Holder" are substituted therefor.

APPROVED
STATE OF NEW YORK
FEB 20 1979
[Signature illegible]
SUPERINTENDENT OF INSURANCE

2. ARTICLE I. DEFINITIONS: The following changes are made in this Article:

Definition 11. In the first sentence the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor.

Definition 12. In the second sentence the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor.

Definition 14. In the second sentence the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor.

The following definitions are added to the end of this Article:

"Definition 30. 'Trust' means the Trust Agreement made and entered into on October 1, 1976 and in effect on May 1, 1978 by and between the Sperry Rand Corporation and The Chase Manhattan Bank, N.A. and as it may be further amended from time to time.

Definition 31. 'Trustee' means The Chase Manhattan Bank, N.A. and such successor trustee or trustees as may from time to time be designated by the Employer.

Definition 32. 'Contract Holder' means The Chase Manhattan Bank, N.A. as Trustee of the Sperry Rand Master Retirement Trust No. 2.

3. ARTICLE III. CONTRIBUTIONS: The following changes are made in this Article:

In Sections 1, 2, 4, 5, 6, 7 and 10 the word "Employer" is stricken out wherever is appears and the words "Contract Holder" are substituted therefor.

SECTION 8. Continuation of Plan with Another Carrier: The following changes are made in this Section:

In the first paragraph prior to item (a) the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor.

In item (a) of the first paragraph the word "Employer" as it appears in the second instance is stricken out and the words "Contract Holder" are substituted therefor.

In item (c) of the first paragraph the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor.

In item (d) of the second paragraph the word "Employer" in the first instance it appears is stricken out and the words "Contract Holder" are substituted therefor.

In item (e) of the second paragraph the word "Employer" is stricken out in both instances where it appears and the words "Contract Holder" are substituted therefor.

SECTION 9. Transfer of Pension Administration Fund: The following changes are made in this Section:

In the first paragraph prior to item (a) the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor:

Item (a) is deleted and the following is substituted therefor:

"(a) that the Employer has in force a retirement plan with the Contract Holder, another insurance company or another trustee under which benefits are being, or will be provided for employees of the Employer included under the Plan,"

In item (c) of the first paragraph the word "Employer" is stricken out and the words "Contract Holder" are substituted therefor.

SECTION 11. Transfer of Separate Funds: The following changes are made in this Section:

In item (b) and item (4) of the first paragraph insert the words "the Contract Holder or" immediately after the words "Separate Funds to".

Wherever the word "Employer" appears in this Section it is stricken out and the words "Contract Holder" are substituted therefor.

SECTION 12. Maximum Considerations Applicable to Certain Employees: In the fourth paragraph the word "Employer" is stricken out and the words "Contract Holder or Sperry Rand Retirement Committee, as applicable" is substituted therefor.

4. ARTICLE V. GENERAL PROVISIONS: The following changes are made in this Article:

In Sections 5, 12 and 16 wherever the word "Employer" appears it is stricken out and the words "Contract Holder" are substituted therefor.

SECTION 8. Modification of This Contract: The following changes are made in this Section:

Wherever the word "Employer" appears in the first, fourth and fifth paragraphs it is stricken out and the words "Contract Holder" are substituted therefor.

The words "the President, a Vice President, the Secretary or the Treasurer of the Employer" appearing in the seventh paragraph are deleted and the words "a Vice President-Trust Officer of the Contract Holder" are substituted therefor.

SECTION 9. Employer or Retirement Committee Not Agents of Company: This Section, including the heading, is deleted in its entirety and the following Section is substituted therefor:

"SECTION 9. Contract Holder, Employer, and Administrator Not Agents of Company

Neither the Contract Holder, the Employer nor the Administrator shall be considered the agent of the Company for any purpose under this Contract."

SECTION 15. Entire Contract: the word "Employer" appearing in the second sentence is stricken out and the words "Contract Holder" are substituted therefor.

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ [name illegible]

Date: March 9, 1979

Countersigned by:

/s/ [name illegible]
Registrar

New York, New York

SPERRY RAND CORPORATION

Date: November 15, 1978

By: /s/ [name illegible]

Title: Assistant Treasurer

New York, New York

THE CHASE MANHATTAN BANK, N.A. AS TRUSTEE OF THE SPERRY RAND MASTER RETIREMENT TRUST NO. 2

Date: November 30, 1978

By: /s/ [name illegible]

Title: Vice President

Form 100-50 GAC-18 Amendment effective May 1, 1978

AMENDMENT to be attached to and made a part of Group Annuity Contract No. 50 GAC issued by the JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

to

THE CHASE MANHATTAN BANK, N.A. as TRUSTEE OF THE SPERRY RAND MASTER RETIREMENT TRUST NO. 2

It is understood and agreed that, effective August 1, 1979, the following modifications and alterations are hereby made in the conditions and provisions of this Contract:

1. COVER PAGE. The following changes are made on the Cover Page:

The words:

"THE CHASE MANHATTAN BANK, N.A. as
TRUSTEE OF THE SPERRY RAND MASTER
RETIREMENT TRUST NO. 2
(hereinafter called the Contract Holder)"

are hereby deleted and the following words are substituted therefor:

"THE CHASE MANHATTAN BANK, N.A. as
TRUSTEE OF THE SPERRY MASTER
RETIREMENT TRUST NO. 2
(hereinafter called the Contract Holder)"

The fourth paragraph is deleted in its entirety.

In the lower right hand corner the words:

Form 100-50 GAC-19 Amendment effective August 1, 1979

"Pension Administration Fund with
Supplemental Fund"

are hereby deleted and the following words are substituted therefor:

"Immediate Participation Guarantee
Non-Contributory"

2. ARTICLE I. DEFINITIONS. The following changes are made in this Article:

Wherever the words "Sperry Rand Retirement Committee" and "Sperry Rand Corporation" appear in this Article they are deleted and the words "Sperry Retirement Committee" and "Sperry Corporation", respectively, are substituted therefor.

Definition 11. This definition is deleted in its entirety and the following definition is substituted therefor:

"Definition 11. 'Contribution' means the amount of the payment due the Company from the Contract Holder on any date in accordance with Section 1 of Article III to maintain the Pension Administration Fund."

Definition 13. This definition is deleted in its entirety.

Definition 14. This definition is deleted in its entirety.

Definition 14A. This definition is deleted in its entirety.

Definition 23. This definition is deleted in its entirety and the following definition is substituted therefor:

"Definition 23. The term 'Employer' means the Sperry Corporation as defined in Section 1.3 of Article I of the Sperry Retirement Program."

Definition 24. This definition is deleted in its entirety and the following definition is substituted therefor:

"Definition 24. The term 'Plan' means Part A of the 'Sperry Retirement Program' as it applies to employees in groups #1, #2 and #6, as in effect January 1, 1968 and as it may be amended from time to time thereafter."

Definition 32. This definition is deleted in its entirety and the following definition is substituted therefor:

"Definition 32. 'Contract Holder' means The Chase Manhatten Bank, N.A. as Trustee of the Sperry Master Retirement Trust No. 2."

3. ARTICLE II. DATES OF COVERAGE AND PLAN OF BENEFITS. The following changes are made in this Article:

Wherever the words "Sperry Rand Retirement Committee" appear in this Article they are deleted and the words "Sperry Retirement Committee" are substituted therefor.

4. ARTICLE III. CONTRIBUTIONS. The following changes are made in this Article:

Wherever the words "Sperry Rand Retirement Committee" appear in this Article they are deleted and the words "Sperry Retirement Committee" are substituted therefor.

Section 1. Contributions to the Group Annuity Contract. The following changes are made in this Section:

In the second sentence of the third paragraph the words "or the Separate Investment Account Number 18" are deleted.

In the first sentence of the *Minimum Limitations* subparagraph of the third paragraph of this Section immediately before item (i), the words "and Separate Investment Account Number 18" are deleted.

In the first sentence of the *Minimum Limitation* subparagraph of the third paragraph of this Section under item (ii), the words "and in Separate Investment Account Number 18 together" are deleted.

Section 2. Pension Administration Fund. The following changes are made in this Section:

In the third sentence of the first paragraph the words " or transferred from the Separate Investment Account Number 18" are deleted.

In the third sentence of the second paragraph the words "plus the amount in the Separate Investment Account Number 18" are deleted.

In the third sentence of the second paragraph the words "plus Separate Investment Account Number 18" are deleted.

In the fourth sentence of the second paragraph the words "or transferred from the Separate Investment Account Number 18" are deleted.

Section 3. Adjustments of Pension Administration Fund. The following change is made in this Section:

In the fourth paragraph the words ",exclusive of the expenses and taxes which are deductible from the Separate Investment Account Number 18." are deleted and a period is placed immediately after the word "thereof".

Section 6. Suspension of Payment of Contributions. The following changes are made in this Section:

In the second sentence of the first paragraph the words "and the Separate Investment Account Number 18" are deleted in both instances where they appear.

Section 7. Discontinuance of Payment of Contributions and Termination of the Pension Administration Fund. The following changes are made in this Section:

In the third paragraph the words "and the Separate Investment Account Number 18" are deleted in both instances where they appear.

In the sixth paragraph the words "and after recognizing any transfer from the Separate Investment Account Number 18" are deleted.

In the eighth paragraph the words "and the Separate Investment Account Number 18" are deleted.

Section 9. Transfer of Pension Administration Fund. The following change is made in this Section:

The tenth paragraph of this Section is deleted in its entirety.

Section 10. Separate Funds. This Section is deleted in its entirety.

Section 11. Transfer of Separate Funds. This Section is deleted in its entirety.

5. ARTICLE IV. PROVISIONS PERTAINING TO THE PAYMENT OF BENEFITS. The following changes are made in this Article:

   Wherever the words "Sperry Rand Retirement Committee" appear in this Article they are deleted and the words "Sperry Retirement Committee" are substituted therefor.

6. ARTICLE V. GENERAL PROVISIONS. The following changes are made in this Article:

   Wherever the words "Sperry Rand Retirement Committee" appear in this Article they are deleted and the words "Sperry Retirement Committee" are substituted therefor.

Section 7. Participation in Divisible Surplus. The following change is made in this Section:

The last sentence of this Section is deleted in its entirety.

Section 8. Modification of This Contract. The following change is made in this Section:

Under item (b) of the first paragraph of this Section the words "and the amount of deduction to be made from the share of net investment earnings which is added to the Supplemental Fund in accordance with the first paragraph of sub-section B of Section 10 of Article III" are deleted.

Section 11. Funds Under this Contract. The following change is made in this Section:

The second sentence of the sole paragraph of this Section is deleted in its entirety.

Section 12. Management of Separate Investment Account Number 18. This Section is deleted in its entirety.

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

/s/ [name illegible], Secretary

Date: February 20, 1981

Countersigned by:

/s/ [name illegible]

Registrar

New York, New York

THE CHASE MANHATTAN BANK, N.A. as TRUSTEE OF THE SPERRY RAND MASTER RETIREMENT TRUST NO. 2

Date: October 29, 1980

By: /s/ [name illegible]

/s/

Witness

Title: Vice President

New York, New York

THE CHASE MANHATTAN BANK, N.A. as TRUSTEE OF THE SPERRY MASTER RETIREMENT TRUST NO. 2

Date: October 29, 1980

By: /s/ [name illegible]

/s/

Witness

Title: Vice President

AMENDMENT to be attached to and made a part of
Group Annuity Contract No. 50 GAC issued by the
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

to

THE CHASE MANHATTAN BANK, N.A. AS TRUSTEE
OF THE SPERRY MASTER RETIREMENT TRUST NO. 2

WHEREAS, certain employees in the active employ of Sperry Vickers of Sperry Corporation, on March 31, 1982 are no longer included under this Contract effective April 1, 1982 and

WHEREAS, such employees shall be included under Group Annuity Contract No. 3607 GAC issued by the Company to Vickers, Incorporated, a wholly owned subsidiary of Sperry Corporation;

NOW THEREFORE, it is understood and agreed that, effective April 1, 1982, all Assets and Liabilities with respect to Retirement Annuities in effect hereunder on account of such employees who are in the active employ of Sperry Vickers of Sperry Corporation, on March 31, 1982, are transferred to Group Annuity Contract No. 3607 GAC. An amount attributable to such employees, as determined by the Employer, shall be transferred from the Fund to the Pension Administration Fund under Group Annuity Contract No. 3607 GAC. The amount so transferred may include a portion of the Restricted Portion of the Fund if such is applicable. In no event, however, shall the amount so transferred be less than 105% of the Liabilities of the Fund, as determined by the Company, attributable to Retirement Annuities in effect with respect to such Transferred employees on March 31, 1982. In addition, a portion, as determined by the Company, of the Contingency Account attributable to the Retirement Annuities so transferred, shall be transferred to the Contingency Account held within the Experience Fund maintained under Group Annuity Contract No. 3607 GAC.

IT IS FURTHER understood and agreed that, if and when Vickers, Incorporated is no longer a wholly-owned subsidiary of Sperry Corporation, all Assets and Liabilities with respect to Retirement Annuities in effect under Group Annuity Contract

No. 3607 GAC on account of employees who retired or terminated with a vested right on or after March 31, 1982 and prior to the date Vickers, Incorporated is no longer a wholly-owned subsidiary of Sperry Corporation, shall be transferred back to this Group Annuity Contract No. 50 GAC. The amount so transferred shall be equal to 105% of the Liabilities of the Fund, as determined by the Company, attributable to Retirement Annuities in effect with respect to such Transferred employees on the date Vickers, Incorporated is no longer a wholly-owned subsidiary of Sperry Corporation. In addition, a portion, as determined by the Company, of the Contingency Account held within the Experience Fund maintained under Group Annuity Contract No. 3607 GAC attributable to the Retirement Annuities so transferred, shall be transferred to the Contingency Account held within the Experience Fund maintained under Group Annuity No. 50 GAC.

Boston, Massachusetts

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY

Date:

Countersigned by:

____

New York, New York

THE CHASE MANHATTAN BANK, N.A.,
AS TRUSTEE OF THE SPERRY MASTER
RETIREMENT TRUST NO. 2

Date:

By: /s/ [name illegible]

Witness: /s/ [name illegible] Title: Vice President

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

36. Denies each and every averment of paragraph 52 thereof, except states that Sperry Corporation has protested to Hancock the use of the 1968 rate basis and tables in determining the Liabilities of the Fund.

37. Denies each and every averment of paragraphs 53 and 54 thereof.

38. With respect to the averments of paragraph 55 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36 and 37 hereof as if fully set forth herein.

39. Denies each and every averment of paragraphs 56 through 59 thereof.

40. With respect to the averments of paragraph 60 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37 and 39 hereof as if fully set forth herein.

41. Denies each and every averment of paragraphs 61 and 62 thereof.

42. With respect to the averments of paragraph 63 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37, 39 and 41 hereof as if fully set forth herein.

43. Denies each and every averment of paragraphs 64 through 66 thereof.

44. With respect to the averments of paragraph 67 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37, 39, 41 and 43 hereof as if fully set forth herein.

45. Denies each and every averment of paragraphs 68 and 69 thereof.

46. With respect to the averments of paragraph 70 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37, 39, 41, 43 and 45 hereof as if fully set forth herein.

47. Denies each and every averment of paragraph 71 thereof.

48. With respect to the averments of paragraph 72 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37, 39, 41, 43, 45 and 47 hereof as if fully set forth herein.

49. Denies each and every averment of paragraph 73 thereof.

50. With respect to the averments of paragraph 74 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37, 39, 41, 43, 45, 47 and 49 hereof as if fully set forth herein.

51. Denies each and every averment of paragraphs 75 and 76 thereof.

52. With respect to the averments of paragraph 77 thereof, repeats and reavers each and every averment of paragraph 1 through 25, 27, 29, 31 through 34, 36, 37, 39, 41, 43, 45, 47, 49 and 51 hereof as if fully set forth herein.

53. Denies each and every averment of paragraphs 78 and 79 thereof.

54. With respect to the averments of paragraph 80 thereof, repeats and reavers each and every averment of paragraphs 1 through 25, 27, 29, 31 through 34, 36, 37, 39, 41, 43, 45, 47, 49, 51 and 53 hereof as if fully set forth herein.

55. Denies each and every averment of paragraph 81 thereof.

56. With respect to the averments of paragraph 82 thereof, repeats and reavers each and every averment of paragraph 1

through 25, 27, 29, 31 through 34, 36, 37, 39, 41, 43, 45, 47, 49, 51, 53 and 55 hereof as if fully set forth herein.

57. Denies each and every averment of paragraph 83 thereof, except respectfully refers the Court to GAC 50, including the 1968 Amendment and other amendments thereto, with regard to the obligations of Hancock thereunder.

58. Denies each and every averment of paragraphs 84 and 85 thereof.

FOR A FIRST DEFENSE, AVERS:

59. The amended complaint fails to state any claim against Hancock upon which relief can be granted.

FOR A SECOND DEFENSE, AVERS:

60. Plaintiff's claims are barred, in whole or in part, by applicable statutes of limitations.

FOR A THIRD DEFENSE, AVERS:

61. Plaintiff's claims are barred, in whole or in part, by laches.

FOR A FOURTH DEFENSE, AVERS:

62. Plaintiff has waived any right it might have had to obtain the relief demanded in the amended complaint.

FOR A FIFTH DEFENSE, AVERS:

63. Plaintiff is estopped by its conduct from obtaining the relief demanded in the amended complaint.

FOR A SIXTH DEFENSE, AVERS:

64. The amended complaint should be dismissed for failure to join Sperry Corporation and the Retirement Committee of Sperry Corporation as parties herein.

FOR A FIRST COUNTERCLAIM, AVERS:

65. Pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), plaintiff is a fiduciary and a party in interest with respect to the Sperry Corporation retirement program to which reference is made in paragraph 7 of the amended complaint (the "Plan").

66. In performing such duties and obligations as it may have had under GAC 50, as amended, Hancock has at all relevant times acted at the direction of, or with the knowledge and consent of, plaintigf or its predecessor.

67. In the event that Hancock is adjudged (a) to have breached any duties or obligations which it may have had arising under ERISA and (b) to be liable to plaintiff in damages in any amount by reason of any such breach, then and in that event plaintiff should also be adjudged (i) to have breached its duties and obligations arising under ERISA and (ii) to be liable to Hancock in damages, in whole or in part, as the facts adduced at trial may warrant, pursuant to the provisions of 29 U.S.C. § 1105.

FOR A SECOND COUNTERCLAIM, AVERS:

68. Hancock repeats and reavers each and every averment of paragraphs 65 and 66 hereof as if fully set forth herein.

69. Plaintiff is a fiduciary at common law with respect to the Plan.

70. In the event that Hancock is adjudged (a) to have breached any fiduciary obligations which it may have had and (b) to be liable to plaintiff in damages in any amount by reason of any such breach, then and in that event plaintiff should also be adjudged (i) to have breached its fiduciary obligations with respect to the Plan and (ii) to be liable to Hancock in damages, in whole or in part, as the facts adduced at trial may warrant.

WHEREFORE, Hancock demands judgment in its favor and against plaintiff, as follows:

(a) dismissing the amended complaint and each and every claim asserted therein with prejudice;

(b) in the event that Hancock is found to be liable to plaintiff in any amount, awarding Hancock judgment on its first counterclaim against plaintiff in such amount as the facts adduced at trial may warrant;

(c) in the event that Hancock is found to be liable to plaintiff in any amount, awarding Hancock judgment on its second counterclaim against plaintiff in such amount as the facts adduced at trial may warrant;

(d) awarding Hancock its costs and disbursements of this action, including reasonable attorneys' fees; and

(e) awarding Hancock such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
May 30, 1984

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTOL

By /s/Howard G. Kristol
A Member of the Firm
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Agreed Statement of Facts

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHASE MANHATTAN BANK, N.A., as Trustee of the Sperry Master Retirement Trust No. 2,

Plaintiff,

— against —

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Defendant.

83 Civ. 5401 (MGC)

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JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Third-Party Plaintiff,

— against —

SPERRY CORPORATION and THE RETIREMENT COMMITTEE OF SPERRY CORPORATION,

Third-Party Defendants.

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AGREED STATEMENT OF FACTS

This Agreed Statement of Facts contains four sections: (A) Stipulated Facts; (B) Admissions by Defendant; (C) Admissions by Plaintiff; and (D) Exhibit

Authenticity Stipulation. The Stipulated Facts are accepted as true by both parties for purposes of their respective substantive motions. The Admissions by Defendant contain assertions by defendant which are not accepted by plaintiff but which may be relied upon by plaintiff, although not by defendant, for purposes of the parties' substantive motions. The Admissions by Plaintiff contain assertions by plaintiff which are not accepted by defendant but which may be relied upon by defendant, although not by plaintiff, for purposes of the parties' substantive motions. With respect to the Exhibit Authenticity Stipulation, the parties agree not to assert authenticity objections in connection with their substantive motions with respect to the following exhibits. The parties reserve all objections other than those on authenticity grounds.

A. STIPULATED FACTS

1. Plaintiff Chase Manhattan Bank, N.A. ("Chase") is a National Association organized and existing under the laws of the United States and has its principal office in New York, New York. Pursuant to an agreement dated October 1, 1976, and effective May 1, 1978, Chase became the trustee for the Sperry Rand Master Retirement Trust No. 2, which was established for the benefit of employees of Sperry Corporation and its participating subsidiary companies. As of October 1, 1987, Harris Trust and Savings Bank ("Harris") became the successor to Chase as Trustee. (Plaintiff herein is sometimes referred to as "Sperry Trust." "Sperry Trust" hereafter shall mean Chase or Harris as Trustee of the Sperry Rand Master Retirement Trust No. 2.). Undisputed Facts, ¶1.

2. Defendant John Hancock Mutual Life Insurance Company ("Hancock") is a Massachusetts corporation having its principal place of business in Boston, Massachusetts. Hancock is licensed, is doing business and has offices within the State of New York. Undisputed Facts, ¶2.

3. Third party defendant Sperry Corporation was a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in New York, New York. On or about November 12, 1986, Sperry Corporation merged with Burroughs Corporation to form Unisys Corporation, a corporation organized and existing under the laws of Delaware. Undisputed Facts, ¶3.

4. Third party defendant The Retirement Committee of Sperry Corporation (the "Sperry Retirement Committee" or "SRC") was later known as the Employee Benefits Executive Committee. The duties previously performed by the SRC are now carried out by the Pension Investment Review Committee of Unisys Corporation. Undisputed Facts, ¶4.

5. As of March 1, 1941, Sperry Corporation and Hancock entered into a Group Annuity Contract, No. 50 GAC ("GAC 50"). Undisputed Facts, ¶5.

6. Pursuant to its terms, GAC 50 provided, among other things, for the purchase from Hancock of deferred annuities, which were to be payable to eligible Sperry Corporation employees or their beneficiaries upon such employees' retirement. These annuities were to be purchased with considerations, sometimes referred to as "contributions," to be paid to Hancock by Sperry Corporation and eligible Sperry Corporation employees, in accordance with purchase rate tables contained in the contract. Undisputed Facts, ¶6.

7. From its inception in 1941 until December 31, 1967, GAC 50 was a Deferred Annuity contract. Under GAC 50, Sperry Corporation purchased deferred annuities from Hancock on an annual basis for each eligible employee. Undisputed Facts, ¶7.

8. In general, the purchase price for a deferred annuity incorporates three factors: (a) a mortality table which estimates actuarially (i) the probability that an annuity benefit will be payable at each month following an annuitant's retirement at the assumed retirement age under the contract and (ii) if and

when a death benefit will be paid; (b) an interest rate for determining the "present value" of the stream of future benefits; and (c) a provision for future expenses, called "loading." Undisputed Facts, ¶8.

9. From GAC 50's inception in 1941 until as of December 31, 1967, the interest rate and mortality assumptions incorporated in GAC 50's purchase rates were changed from time to time. During that period, the interest rate assumptions incorporated in the purchase rates ranged from 2% to 3%. Undisputed Facts, ¶9.

10. Upon the purchase of any deferred annuity pursuant to GAC 50 during the time GAC 50 existed as a deferred annuity type of contract, Hancock guaranteed the payment of such annuity to the covered employee for life to the extent the employee would be entitled to such payment in accordance with the Retirement Program. Undisputed Facts, ¶10.

11. From its inception, GAC 50 has been a "participating" contract. A participating contract is one that is entitled to participate in the aggregate of the contract's experience, including mortality, expense and investment experience, to the extent that such experience is more favorable than the experience assumed in the contract's purchase rates. Undisputed Facts, ¶11.

12. With respect to Hancock's General Account, Hancock has sole authority and discretion, in accordance with and as limited by applicable laws and regulations, to establish and execute investment policy and to allocate investment income, capital gains and losses and investment expenses to particular lines of business, classes of contracts and particular contracts. Undisputed Facts, ¶12.

13. Hancock also has issued "non-participating" Group Pension contracts, such as the Guaranteed Investment Contract ("GIC") and Single Premium Annuity Contract. Non-participating group pension contracts are not entitled to participate in their contract experience, including, among other

things, the investment experience of the General Account. Non-participating contracts commonly contain either a guaranteed rate of return or a guarantee that specified benefits will be paid to a specified population for a fixed (often single) premium payment, although such features are not unique to non-participating contracts. Undisputed Facts, ¶13.

14. A GIC generally includes a guaranteed rate of return on funds contributed by the contractholder. Defendant's Response to Plaintiff's Request for Admissions, ¶161.

15. The right of participating General Account contracts to participate in the aggregate of their contract experience, including the investment experience of the General Account, distinguishes them from non-participating General Account contracts. Participation can take one of two forms — "direct-rated" or "dividend-rated." "Dividend-rated" contracts are sometimes known as "non direct-rated" contracts. Undisputed Facts, ¶14.

16. Hancock's Board of Directors annually votes, in its "dividend vote," to apportion and pay or allow a distribution of surplus with respect to eligible group annuity contracts and votes therein to adopt formulas for determining the distribution of such surplus.

17. For dividend-rated participating contracts, the aggregate of their contract experience, including investment, mortality and expense experience, to the extent more favorable than the experience assumed in the contract's purchase rates, is ultimately distributed to the contractholder, in whole or in part, as dividends. Undisputed Facts, ¶15.

18. For direct-rated participating contracts, the aggregate of their contract experience, including investment, mortality and expense experience, is directly credited to the contract's direct-rated "Fund." Undisputed Facts, ¶16.

19. From its inception until December 31, 1967, GAC 50 was a dividend-rated participating contract. Since January 1, 1968,

GAC 50 has been partially direct-rated and partially dividend-rated. Undisputed Facts, ¶17.

20. In 1959, Hancock changed its method for allocating investment income by adopting the "investment generation" method. In general, the investment generation method tracks the net increase in the experience account of each contract for each year (the "cell"). It credits each cell with the rate of return for General Account assets acquired by Hancock in the original investment year, adjusted for "rollover," which includes the maturity, sale, call and elimination through default of assets. As original investments mature, or "roll over," rates of return on new investments made with the proceeds will affect credits to the cell for the original investment year. On July 27, 1962, the New York State Insurance Department approved the investment generation method. Since 1959, Hancock has used the investment generation method to allocate net investment income to the experience accounts and direct-rated funds of its Group Pension participating contracts. Undisputed Facts, ¶18.

21. Through its investment generation method, Hancock allocates income, capital gains or losses, expenses and taxes to lines of business participating in the experience of Hancock's General Account. The same method is used by Hancock for the purpose of allocations to IPG contracts.

22. For a given year, the average of the rates of return for each cell, weighted to reflect the size of each cell for a particular contract, is referred to as the contract's "case rate." Undisputed Facts, ¶19.

23. By an amendment signed by the parties and effective as of January 1, 1968 (the "1968 Amendment"), GAC 50 was converted to a direct-rated Retrospective Immediate Participation Guarantee ("Retro-IPG") form of contract. Undisputed Facts, ¶20.

24. The 1968 Amendment was executed by Sperry Corporation on or about November 12, 1969 and by Hancock on or about January 28, 1970. Undisputed Facts, ¶21.

25. Hancock IPG contracts are "participating" contracts. Net investment income allocated to an IPG contract is directly credited on an annual basis to the "Fund," as defined in the contract, sometimes called the Pension Administration Fund ("PAF") and also known as the "IPG Fund." Under normal circumstances, a new-issue Hancock IPG contract, being solely a direct-rated contract, does not receive dividends. Undisputed Facts, ¶28.

26. The amount of the PAF depends, among other things, upon the investment performance of Hancock's General Account and upon the allocation of that performance to GAC 50. Defendant's Response to Plaintiff's Request for Admissions, ¶76.

27. Under the 1968 Amendment, Hancock guarantees that the PAF on any date will not be less than it otherwise would have been if the sum of the net interest earned and capital gains and losses apportioned to the PAF had always been zero from January 1, 1968.

28. As required by state law, Hancock annually establishes dividend formulae and determines the amount of any dividend to be paid under its participating contracts or policies, including GAC 50. Undisputed Facts, ¶29.

29. As of January 1, 1968 and upon the 1968 Amendment's becoming effective, GAC 50's Contingency Account represented the maximum amount potentially available under normal circumstances for dividend distribution to the contractholder. The Contingency Account as of January 1, 1968 consisted of the balance of GAC 50's pre-1968 "experience account" after deduction of GAC 50's Liabilities of the Fund ("LOF") and certain other amounts. Undisputed Facts, ¶30.

30. In the period January 1, 1971 through December 31, 1981, no dividends were paid under GAC 50. Undisputed Facts, ¶32.

31. Sperry Corporation and/or Sperry Trust was informed when Hancock paid a dividend or credited a dividend to GAC 50's PAF. Undisputed Facts, ¶49.

32. Pursuant to the 1968 Amendment, annuities purchased by Sperry Corporation from 1941 through December 31, 1967 for certain employees (the "pre-1968 Annuities") were "cancelled," as that term is used in the 1968 Amendment. The "cancellation" of the pre-1968 Annuities did not affect the guarantees of benefits by Hancock to participants and beneficiaries. Undisputed Facts, ¶33.

33. The 1968 Amendment provided that, if Sperry Corporation failed to maintain GAC 50's PAF and Supplemental Fund balances at or above a Minimum Operating Level ("MOL") equal to 105% of its LOF or to maintain the PAF balance at least equal to the LOF, the PAF could be "terminated," as that term is used in the contract. GAC 50's LOF as of January 1, 1968, was based upon rate tables, incorporated into and made a part of the contract, which contained 2-1/2% and 3% interest rate assumptions and employed the 1937 Standard Annuity and 1951 Group Annuity Mortality Tables, with specified adjustments to reflect mortality improvement. Undisputed Facts, ¶34.

34. Since as of 1968, Hancock used and continues to use the interest rate assumptions incorporated in the 1968 Amendment's rate tables in its annual computation of the portion of GAC 50's LOF pertaining to the pre-1968 Annuities. Undisputed Facts, ¶35.

35. Under the 1968 Amendment, provision was made for the "repurchase" of the pre-1968 Annuities on the same aggregate terms as were applicable to such annuities prior to January 1968 under specified conditions. Undisputed Facts, ¶36.

36. Pursuant to the 1968 Amendment, certain events could trigger the termination of the PAF. Termination of the PAF could be triggered, among other things, by the contractholder's failure to maintain GAC 50's PAF balance at or above LOF and the PAF and Supplemental Fund balances together at or above MOL. Upon termination of the PAF, the contract would cease to function in the manner of a Retro-IPG contract, the "cancelled" pre-1968 annuities would be "repurchased," and the

contract would thereafter function in the manner of a Deferred Annuity contract. Undisputed Facts, ¶37.

37. The consequences of "termination" of the PAF (as that term is defined in the contract) would include (a) the contract would cease to function in the manner of a Retrospective IPG contract and (b) the contract would thereafter function in the manner of a Deferred Annuity contract. Defendant's Response to Plaintiff's Request for Admissions, ¶58.

38. As of January 1, 1968, GAC 50's LOF was equal in amount to GAC 50's PAF balance. Since at least the early 1970's, GAC 50's PAF balance has exceeded the amount of its MOL (and thus its LOF). Undisputed Facts, ¶38.

39. The 1968 Amendment also established a method for the provision of additional benefits payable for the period after December 31, 1967. Under the 1968 Amendment, upon an eligible employee's retirement Hancock would determine, pursuant to rate tables contained in GAC 50, the amount by which LOF would increase if that portion of the employee's retirement benefit accruing in the period after January 1, 1968 were to be "guaranteed" by Hancock. If GAC 50's PAF balance exceeded the contractual MOL based upon this increased LOF, Hancock would guarantee the payment of the additional benefits. Under the 1968 Amendment, Hancock had the right after 1972 to change these rate tables. The new tables would apply only to benefits guaranteed after the effective date of the change of the tables. Undisputed Facts, ¶39.

40. Under the 1968 Amendment, if the amount of the PAF fell below the amount of the LOF or if the amount of the PAF and the Supplemental Fund balances together fell below the amount of MOL, Hancock could ask Sperry Corporation for a contribution. In either such event, Hancock was not obligated to guarantee any retirement benefits not previously guaranteed. Undisputed Facts, ¶40.

41. As of January 1, 1968, the rates for the calculation of the portion of the LOF for retirement benefits guaranteed after

December 31, 1967, incorporated a 5% interest factor and the 1951 Group Annuity Mortality Table, with specified adjustments to reflect mortality improvement. Undisputed Facts, ¶41.

42. Any termination of the PAF would result in Hancock's "repurchase" of the pre-1968 Annuities and the purchase of annuities sufficient to provide the benefits guaranteed by Hancock in the period after January 1, 1968, at the rates set forth in the 1968 Amendment. Undisputed Facts, ¶42.

43. The 1968 Amendment provides, among other things, that Hancock shall credit the PAF annually with the PAF's share and the Contingency Account's share of the net interest earned and apportioned to Hancock's Group Pension line of business, less 1% of such share. Undisputed Facts, ¶43.

44. Hancock has maintained a record, known as "Account 9," which included the amount of the risk charges in excess of 1% of net interest that would have been allocable to GAC 50 under Hancock's annual risk charge votes but for the 1% provision. The Account 9 record also included, among other things, the amounts of net interest, realized capital gains and losses, and taxes that would have been allocated to Hancock's unallocated surplus had the risk charges in excess of 1% of net interest been charged to GAC 50. Undisputed Facts, ¶44.

45. The 1968 Amendment provides that Hancock determine as of December 31 of each calendar year commencing on and after January 1, 1968 (a) the LOF and (b) whether the amount of the PAF exceeds the amount of the LOF. Undisputed Facts, ¶45.

46. From 1968 to the present, Hancock has reported GAC 50's PAF balance to Sperry Corporation or Sperry Trust on an annual basis. Since 1968, Hancock has maintained a record of GAC 50's experience account, or "asset share," which consists of the contract's PAF and Contingency Account balances and also reflects the balance of Account 9. The experience account so recorded was never used for allocating experience to the contract's PAF and Contingency Account. Undisputed Facts, ¶46.

47. If the PAF had been terminated prior to January 1, 1988, the amount potentially available for dividend distribution to Sperry Corporation or Sperry Trust would have been reduced by that part of Account 9 attributable to the risk charges in excess of 1% of net interest that would have been allocable to GAC 50 under Hancock's annual risk charge votes but for the 1% provision. Undisputed Facts, ¶47.

48. Since January 1, 1988, Hancock has continued to maintain with respect to GAC 50 and other group annuity contracts a record known as Account 9. Defendant's Response to Plaintiff's Request for Admissions, ¶69.

49. The 1968 Amendment provides that Hancock's annual determination of the amount of net interest allocated to GAC 50 in accordance with Hancock's regular procedures in effect for contracts of the same class as GAC 50 at the time of such determination shall be conclusive for purposes of the contract. Undisputed Facts, ¶50.

50. The 1968 Amendment provides that Hancock's determination of the amount of capital gains or losses allocable to GAC 50, in accordance with Hancock's regular procedures in effect for contracts of the same class as GAC 50 at the time of each such determination, shall be conclusive for purposes of the contract. Undisputed Facts, ¶52.

51. The 1968 Amendment provides that Hancock's determination of the amount of expenses incurred by and/or to be allocated and apportioned to GAC 50 each year in accordance with Hancock's regular procedures in effect for contracts of the same class as GAC 50 at the time of each such determination shall be conclusive for purposes of the contract. Undisputed Facts, ¶53.

52. The 1968 Amendment provides that Hancock's annual determination of the amount of taxes allocated and apportioned to GAC 50 in accordance with Hancock's regular procedures in effect for contracts of the same class as GAC 50 at the time of each such determination shall be conclusive for purposes of the contract. Undisputed Facts, ¶54.

53. GAC 50 provides that, if there is a balance in the PAF upon GAC 50's termination, Hancock shall pay or apply such balance in a manner to be determined by mutual agreement between Hancock and Sperry Trust. Defendant's Response to Plaintiff's Request for Admissions, ¶107.

54. Hancock is required under GAC 50 to determine LOF annually. The method employed by Hancock each year to determine the LOF for GAC 50 has been to utilize the LOF rates incorporated into and made a part of the contract by the 1968 Amendment. Undisputed Facts, ¶55.

55. Immediately prior to the commencement of this action, GAC 50's case rate exceeded the interest rate assumptions used to compute the LOF, and GAC 50's PAF was greater than its LOF. Undisputed Facts, ¶56.

56. General Account funds are utilized by Hancock for, among other things, investment in subsidiaries and the acquisition and maintenance of "Home Office" properties, i.e. the buildings, land and physical plant maintained by Hancock for the operation of its business. Undisputed Facts, ¶57.

57. Hancock annually determines the rate of return on its Home Office properties. Hancock annually allocates income and losses from its Home Office properties to its participating General Account contracts, including GAC 50, as part of its process of allocating and apportioning investment income to its various lines of business. Undisputed Facts, ¶58.

58. In 1969, Hancock changed its procedure for allocating Federal Income Taxes to contingency accounts, PAF's and experience accounts so that any tax credits arising under participating group annuity contracts would be credited to unallocated surplus. That procedure was made effective with respect to 1968 and subsequent years and remained in effect through 1978. In years prior to 1968, Federal Income Taxes allocated in connection with participating group annuity contracts were limited to positive amounts. In years prior to 1968,

any "negative" taxes, *i.e.*, tax credits, attributable to a participating group annuity contract could serve to reduce the Federal Income Taxes otherwise chargeable with respect to other participating group annuity contracts. Undisputed Facts, ¶59.

59. From 1968 through 1978, Federal Income tax credits available to Hancock with respect to participating contracts were credited to Hancock's unallocated surplus. Undisputed Facts, ¶60.

60. In 1971, Hancock adopted a policy of imputing to common stock investments made in a particular year the yields on Hancock's bond and mortgage investments made for that year in the first two years of the life of those common stock investments. Undisputed Facts, ¶61.

61. For the 1970 investment generation year, this policy raised the "new money" rate for the General Account, i.e., the rate of return on funds invested in the current year, from 7.31% to 7.94%. Undisputed Facts, ¶62.

62. The effect of this policy on participating contract interest allocation was to reduce the rate of income allocated on account of pre-1970 experience account increases. Undisputed Facts, ¶63.

63. This new policy applied to common stock investments made prior to 1977. Undisputed Facts, ¶64.

64. In 1979, Hancock adopted a policy under which, for the purposes of allocating investment results, the Group Pension line of business would not participate in future purchases of common stocks. Undisputed Facts, ¶65.

65. Following the conversion of GAC 50 to the Retro-IPG form of contract and prior to 1976, Hancock acted as an actuary with respect to Part A of the Sperry Retirement Program (the "Plan") and submitted annual actuarial valuations of the portion of the Plan involving GAC 50 to Sperry Corporation. Undisputed Facts, ¶66.

66. In connection with these actuarial valuations, Hancock employed interest assumptions that were different from the interest assumptions contained in the LOF rates under the 1968 Amendment. Undisputed Facts, ¶67.

67. In or about March of 1975, Sperry Corporation received from the Equitable Life Assurance Society of the United States a Report to Equitable Contract Holders, dated March 14, 1975, and entitled Pensions and Profit Sharing, which addressed the subject of compliance with ERISA. By letter dated March 25, 1975, Thomas V. Hirschberg wrote to Philip W. Jefferson at Hancock regarding ERISA and enclosed a copy of the Report to Equitable Contract Holders, dated March 14, 1975. Undisputed Facts, ¶70.

68. Thomas V. Hirschberg and Kenneth Crafts participated on behalf of Sperry in the activities of a committee known as "ERIC". ERIC was formed in 1975 after the enactment of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (1974) ("ERISA"). From the time of its formation through at least the end of 1978, the membership of the committee known as ERIC consisted principally of large companies and other entities sponsoring pension plans or the representative of such companies or entities. Undisputed Facts, ¶71.

69. Certain Hancock employees participated on behalf of Hancock in the activities of an entity known as "ERIC." Defendant's Response to Plaintiff's Request for Admissions, ¶171.

70. ERIC was formed to, among other things, engage in review, lobbying and study of ERISA. Undisputed Facts, ¶72.

71. ERIC was formed to, among other things, disseminate information to its members relating to ERISA and to changes that ERISA did or might require in its members' conduct relating to their pension plans in order to comply with ERISA. Undisputed Facts, ¶74.

72. ERIC's activities through July 19, 1977, included, among other things, lobbying and disseminating information to its members relating to ERISA. Undisputed Facts, ¶73.

73. ERIC's activities through July 19, 1977, included, among other things, disseminating information to its members relating to changes that ERISA did or might require in its members' conduct relating to their pension plans in order to comply with ERISA. Undisputed Facts, ¶75.

74. It is Hancock's understanding that ERIC engaged in lobbying with Congress and/or administrative agencies relating to ERISA. Defendant's Response to Plaintiff's Request for Admissions, ¶174.

75. The 1968 Amendment provides that the Asset Liquidation Adjustment ("ALA") shall be determined by Hancock using such approximations as it deems equitable and appropriate on the basis of the information most recently available for making such determination. Undisputed Facts, ¶68.

76. The 1968 Amendment provides that Hancock would determine the ALA in accordance with uniform procedures applicable to all contracts of the same class as GAC 50. Plaintiff's Response to Defendant's Request for Admissions, ¶108.

77. Hancock from time to time had procedures in effect, sometimes known as the "rollover facility," pursuant to which a contractholder could obtain upon request a transfer of a portion of the funds held under the contract at book value. Hancock from time to time, at the request of Sperry Corporation or Sperry Trust, transferred funds held under GAC 50 at book value using these procedures. Undisputed Facts, ¶69.

78. Transfers were made at Sperry Trust's request pursuant to "rollover" procedures in 1979 and 1981. Defendant's Response to Plaintiff's Request for Admissions, ¶88.

79. Hancock has not agreed to a transfer request by Sperry Trust utilizing "rollover" procedures since 1981. Defendant's Response to Plaintiff's Request for Admissions, ¶96.

80. By means of an amendment executed by Sperry Corporation on or about June 29, 1978 and by Hancock on or about

October 12, 1978 and effective as of August 1, 1977 (the "1977 Amendment"), GAC 50 was converted to a Retrospective-IPG/Prospective Deferred Liability form of contract. Under the 1977 Amendment, GAC 50's LOF would not automatically be increased upon the retirement of any employee and new retirement benefits would not automatically be guaranteed by Hancock. Under that amendment, on any date after August 1, 1977, the SRC could request that Hancock establish guaranteed benefits in addition to the benefits already guaranteed as of that date. Undisputed Facts, ¶76 and Plaintiff's Response to Defendant's Request for Admissions, ¶200.

81. Since the effective date of the 1977 Amendment, the SRC has not requested that Hancock establish any new "guaranteed benefits." Undisputed Facts, ¶77.

82. The 1977 Amendment provided for and permitted under certain circumstances the payment of "Non-Guaranteed Benefits." The 1977 Amendment further provided, among other things, that the monthly amount of Non-Guaranteed Benefits for eligible employees designated by the SRC, as well as any determination of eligibility for such benefits, would be determined solely by the SRC in accordance with the Plan. Undisputed Facts, ¶79.

83. Pursuant to the 1977 Amendment, Hancock paid Non-Guaranteed Benefits on a monthly basis through June 1982. Undisputed Facts, ¶80.

84. By letter dated May 24, 1982, Hancock was notified by the SRC that the Sperry Retirement Program had been amended to include retired employees of the Univac Division of Sperry Corporation within the category of eligible employees covered by GAC 50. Undisputed Facts, ¶81.

85. By letter dated May 24, 1982, the SRC requested payment by Hancock of Non-Guaranteed Benefits for the month of June 1982. Undisputed Facts, ¶82.

86. By letter dated May 27, 1982, Hancock gave notice of its intention to cease making payments of Non-Guaranteed Benefits, effective 31 days from the date of such notice. Undisputed Facts, ¶83.

87. Since June 1982, Hancock has not made any Non-Guaranteed Benefit payments. Undisputed Facts, ¶84.

88. In 1982, Hancock determined to "segment" its General Account into subaccounts, each with its own investment policy. Two of the "segments" have been designated as the Pension Participating Segment, which is applicable to GAC 50, and the Pension Non-Participating Segment. Undisputed Facts, ¶88.

89. "New money" rates for particular segments of Hancock's General Account reflect the allocation of investment income to the respective segments. Defendant's Response to Plaintiff's Request for Admissions, ¶142.

90. In the insurance industry, "reserve-straining business" refers to contracts under which the premiums payable are less than the minimum statutory reserve level that state insurance authorities require for such contracts. Undisputed Facts, ¶90.

91. Reserve-straining business generates "negative operating gain" and reduces statutory surplus. Undisputed Facts, ¶91.

92. Surplus augments Hancock's capacity to write reserve-straining business. Undisputed Facts, ¶92.

93. Hancock has never established a statutory reserve for the Contingency Account. Undisputed Facts, ¶31.

B. ADMISSIONS BY DEFENDANT

94. It is Hancock's position that the amounts represented by the Contingency Account are part of Hancock's surplus and are available to satisfy any and all of Hancock's General Account obligations. Defendant's Response to Plaintiff's Request for Admissions, ¶159.

95. It is Hancock's position that upon the termination of the PAF associated with GAC 50, the limitation on the deduction from the PAF's and the Contingency Account's allocable share of net interest to 1% would not apply. Defendant's Response to Plaintiff's Request for Admissions, ¶59.

96. It is Hancock's position that if prior to the final termination of the contract the PAF has terminated, any dividend and its amount would be determined in accordance with the dividend formulae then in effect, as required by applicable state law. Defendant's Response to Plaintiff's Request for Admissions, ¶108.

97. It is Hancock's position that the 1977 Amendment provides that "Non-Guaranteed Benefits" under GAC 50 could be paid to the extent the PAF exceeded the MOL, subject to certain conditions, including Hancock's right to cease making such payments in accordance with the provisions of the 1977 Amendment. Defendant's Response to Plaintiff's Request for Admissions, ¶113.

98. Hancock estimated at one time in 1982 that the ALA that would have been applicable to a transfer at that time of the Transferable Balance under GAC 50 was approximately 39%. That fact was communicated to Sperry Corporation and the SRC. Defendant's Response to Plaintiff's Request for Admissions, ¶78.

99. It is Hancock's position that in or about 1982, Hancock and the SRC and Sperry Corporation engaged in negotiations regarding possible amendments to GAC 50, including amendments that would have changed the rate bases and tables in GAC 50 and would have permitted a transfer of certain funds from GAC 50's PAF without application of an ALA. The parties were unable to reach agreement with respect to such amendments. Defendant's Response to Plaintiff's Request for Admissions, ¶97.

C. ADMISSIONS BY PLAINTIFF

100. While GAC 50 was a deferred annuity contract, Sperry Corporation's contributions were deposited by Hancock in its

General Investment Account. Plaintiff's Response to Defendant's Request for Admissions, ¶6.

101. Hancock offered to amend GAC 50 to convert it from a deferred annuity contract to a form of contract participating immediately in the experience of Hancock's general investment account. Plaintiff's Response to Defendant's Request for Admissions, ¶11.

102. Hancock offered to amend GAC 50 to convert it from a deferred annuity contract to, *inter alia*, a retrospective IPG ("Retro-IPG") contract. Plaintiff's Response to Defendant's Request for Admissions, ¶12.

103. Among the reasons Sperry Corporation accepted the 1968 Amendment were that the requirement of annual contributions for each employee was eliminated and that the interest rate assumptions on future annuities provided under GAC 50 after its amendment would be 5 percent, resulting in a cost savings to the Plan and Plan sponsor without reducing the level of benefits available to eligible Sperry Corporation employees and beneficiaries of the Plan. Plaintiff's Response to Defendant's Request for Admissions, ¶16.

104. Sperry Corporation entered into the 1968 Amendment because, among other reasons, Hancock represented that it would result in Sperry Corporation's receiving the benefit of the investment experience of Hancock's general investment account more quickly than it had received the benefit of such investment experience when GAC 50 was a deferred annuity contract. Plaintiff's Response to Defendant's Request for Admissions, ¶20.

105. The 1968 Amendment contains purchase rates to be used by Hancock, until amended or changed, for the calculation of LOF. Plaintiff's Response to Defendant's Request for Admissions, ¶76.

106. Hancock has used the purchase rates set forth in Article VI of the 1968 Amendment to calculate LOF. Plaintiff's Response to Defendant's Request for Admissions, ¶79.

107. The 1968 Amendment provides that Sperry Trust may at any time direct Hancock to transfer funds to another insurance company or an appropriate trustee in the amount by which the PAF exceeds the LOF at the time of transfer (the "Transferable Balance"). Plaintiff's Response to Defendant's Request for Admissions, ¶91.

108. Article III, Section 9 of the 1968 Amendment contains provisions discussing when an ALA would be charged or credited in connection with a transfer of the Transferable Balance. Plaintiff's Response to Defendant's Request for Admissions, ¶92.

109. Article III, Section 9 of the 1968 Amendment sets forth the circumstances under which an asset liquidation charge or credit will be made in connection with a transfer of the Transferable Balance. Plaintiff's Response to Defendant's Request for Admissions, ¶95.

110. Pursuant to the 1968 Amendment, the amount of GAC 50's "experience account," which had been developed by Hancock in connection with the pre-1968 Annuities, less certain amounts, was credited to PAF and the Contingency Account. Plaintiff's Contentions of Fact, ¶4.

111. Since the 1968 Amendment became effective, Hancock has continued to use the original LOF rates with interest assumptions of eitiher 2-1/2%, 3% or 5%, depending upon the year in which benefits were initially guaranteed by Hancock. Since the 1968 Amendment, those interest assumptions have not been changed, have been used by Hancock each year for the annual determination of GAC 50's LOF and would be used by Hancock in the event of a "repurchase" of the annuities. Plaintiff's Contentions of Fact, ¶5.

112. The portion of Hancock's General Account associated with its Group Pension line of business consists primarily of fixed income securities. Hancock has taken the position that any lump-sum transfer of funds out of the General Account must be subject to a book-to-market "Asset Liquidation Adjustment" ("ALA"), whether or not the transfer necessitates the

actual liquidation of any assets. Plaintiff's Contentions of Fact, ¶40.

113. Unlike a Retro-IPG contract, under a GIC there is no risk of loss to the contractholder. Therefore, GIC's are "guaranteed benefit polic[ies]" as that term is used in ERISA. Plaintiff's Contentions of Fact, ¶93.

114. The 1968 Amendment for the first time added a contractual "risk charge" to GAC 50. Prior to 1968, there had been no provision in the contract for such a charge. As a result of the 1968 Amendment, a risk charge of 1% of net interest income was added to GAC 50. Plaintiff's Contentions of Fact, ¶101.

D. EXHIBIT AUTHENTICITY STIPULATION

1. *Plaintiff's List*

Plaintiff's Trial Exhibit 12
Plaintiff's Trial Exhibit 25
Plaintiff's Trial Exhibit 36
Plaintiff's Trial Exhibit 56
Plaintiff's Trial Exhibit 82
Plaintiff's Trial Exhibit 96
Plaintiff's Trial Exhibit 110
Plaintiff's Trial Exhibit 145
Plaintiff's Trial Exhibit 156
Plaintiff's Trial Exhibit 168 A
Plaintiff's Trial Exhibit 168 B
Plaintiff's Trial Exhibit 173
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Plaintiff's Trial Exhibit 200
Plaintiff's Trial Exhibit 218
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Plaintiff's Trial Exhibit 421 A
Plaintiff's Trial Exhibit 421 B
Plaintiff's Trial Exhibit 432
Plaintiff's Trial Exhibit 449
Plaintiff's Trial Exhibit 452 A (B.N. 1563)
Plaintiff's Trial Exhibit 452 B
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Plaintiff's Trial Exhibit 761
Plaintiff's Trial Exhibit 767
Plaintiff's Trial Exhibit 788
Plaintiff's Trial Exhibit 795
Plaintiff's Trial Exhibit 819
Plaintiff's Trial Exhibit 820
Plaintiff's Trial Exhibit 853
Plaintiff's Trial Exhibit 854

2. *Defendant's List*

Defendant's Trial Exhibit No. 1818 (Bates Nos. 563345-563390, 563283, 563233-563240, 563220, 563211-563215, 563131-563133, 563067-563070, 562974)
Plaintiff's Trial Exhibit No. 25
Defendant's Trial Exhibit No. 1818 (Bates No. 563330-563390)
Defendant's Trial Exhibit No. 1818 (Bates No. 563329)
Defendant's Trial Exhibit No. 1818 (Bates No. 563328)
Defendant's Trial Exhibit No. 1818 (Bates Nos. 563280-563281, 563283)
Defendant's Trial Exhibit No. 1818 (Bates No. 563279)
Defendant's Trial Exhibit No. 1818 (Bates No. 563278)
Defendant's Trial Exhibit No. 1818 (Bates Nos. 563230-563240)
Defendant's Trial Exhibit No. 1818 (Bates No. 563229)
Defendant's Trial Exhibit No. 1818 (Bates Nos. 563216-563218, 563220)
Defendant's Trial Exhibit No. 1818 (Bates No. 563219)
Defendant's Trial Exhibit No. 1818 (Bates Nos. 563202, 563211-563215)
Defendant's Trial Exhibit No. 1818 (Bates No. 563203)
Defendant's Trial Exhibit No. 1818 (Bates No. 563204)
Defendant's Trial Exhibit No. 1818 (Bates Nos. 563126-563128, 563131-563133)
Defendant's Trial Exhibit No. 1818 (Bates No. 563129)

Defendant's Trial Exhibit No. 1818 (Bates No. 563130)
Defendant's Trial Exhibit No. 1818 (Bates Nos. 563062-563064, 563067-563070)
Defendant's Trial Exhibit No. 1818 (Bates No. 563065)
Defendant's Trial Exhibit No. 1818 (Bates No. 563066)
Defendant's Trial Exhibit No. 1818 (Bates No. 563056)
Defendant's Trial Exhibit No. 1090 (Bates Nos. 545684-545704)
Defendant's Trial Exhibit No. 1108
Defendant's Trial Exhibit No. 1285
Defendant's Trial Exhibit No. 1847
Defendant's Trial Exhibit No. 1731
Defendant's Trial Exhibit No. 1850
Defendant's Trial Exhibit No. 1852
Defendant's Trial Exhibit No. 1851
Defendant's Trial Exhibit No. 528
Defendant's Trial Exhibit No. 581
Defendant's Trial Exhibit No. 628
Defendant's Trial Exhibit No. 664
Defendant's Trial Exhibit No. 709
Defendant's Trial Exhibit No. 768
Defendant's Trial Exhibit No. 900
Defendant's Trial Exhibit No. 1007
Defendant's Trial Exhibit No. 1112
Defendant's Trial Exhibit No. 1220
Defendant's Trial Exhibit No. 1453
Defendant's Trial Exhibit No. 1556
Defendant's Trial Exhibit No. 1747
Plaintiff's Trial Exhibit No. 107
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Plaintiff's Trial Exhibit No. 80
Plaintiff's Trial Exhibit No. 114
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Plaintiff's Trial Exhibit No. 188
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Plaintiff's Trial Exhibit No. 331

Plaintiff's Trial Exhibit No. 379
Plaintiff's Trial Exhibit No. 420
Plaintiff's Trial Exhibit No. 472
Plaintiff's Trial Exhibit No. 532
Plaintiff's Trial Exhibit No. 601
Plaintiff's Trial Exhibit No. 700
Plaintiff's Trial Exhibit No. 703
Plaintiff's Trial Exhibit No. 724
Plaintiff's Trial Exhibit No. 735
Plaintiff's Trial Exhibit No. 748
Plaintiff's Trial Exhibit No. 765
Plaintiff's Trial Exhibit No. 766
Plaintiff's Trial Exhibit No. 707
Defendant's Trial Exhibit No. 1367
Defendant's Trial Exhibit No. 1488
Defendant's Trial Exhibit No. 1531

Dated: New York, New York
November 23, 1988

Jointly submitted by:

ANDERSON RUSSELL KILL & OLICK, P.C.

By: /s/ ____________________
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Manhattan Bank, N.A., as Trustee for
the Sperry Master Retirement Trust No. 2

REBOUL, MacMURRAY, HEWITT, MAYNARD & KRISTOL

By: /s/ ____________________
A Member of the Firm
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(212) 841-5700
Attorneys for John Hancock
Mutual Life Insurance Company

GAC 50 (Amendments Nos. 10 to 20)

AMENDMENT to be attached to and made a part of
Group Annuity Contract No. 50 GAC issued by the
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
covering certain employees of

SPERRY RAND CORPORATION

It is understood and agreed that, effective January 1, 1968, the following modifications and alterations are hereby made in the conditions and provisions of this Contract:

1. Article I, II, III, IV, V and VI of Part A, Part B, Part C, Part D and Part E of this Contract are amended in their entirety as set forth hereinafter in this amendment, except to the extent that certain provisions of such Articles, as in effect on December 31, 1967 are specifically incorporated in this amendment by reference.

2. Cover Page: The following changes are made on this Page:

   The following paragraph is added to the end of and made a part of the first page and becomes the fourth paragraph on this page:

   "Payments made by the Employer to the Supplemental Fund shall participate on a pooled basis directly in the investment experience of the Company's Separate Investment Account."

   The word "Contributory" appearing in the lower right corner is stricken out and the words "Pension Administration Fund with Supplemental Fund" are inserted therefor.

Boston, Massachusetts

JOHN HANCOCK MUTUAL
LIFE INSURANCE COMPANY

/s/ Kenneth F. Mac Iver Secretary

Date: January 28, 1970

Countersigned by /s/ Thomas H. Hogan Jr.
Registrar

New York, New York

SPERRY RAND CORPORATION

Date: NOV 12 1969

By /s/

APPROVED
STATE OF NEW YORK
[Date illegible]
[Signature illegible]
SUPERINTENDENT OF INSURANCE

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ARTICLE I. DEFINITIONS

1. Unless otherwise specified, wherever the word "hereof" or "hereunder" or a similar word is used, it shall refer to the entire Group Annuity Contract and not to any particular Amendment, Article or Section of this Contract.

2. "Contract Anniversary" means a first day of May subsequent to May 1, 1941 except that subsequent to May 1, 1967 "Contract Anniversary" means January 1, 1968 or any first day of January thereafter; and "Contract Year" means the period commencing with May 1, 1941 and ending on April 30, 1942, the period of twelve months commencing with any Contract Anniversary prior to May 1, 1967, the eighth month period commencing May 1, 1967 and ending on December 31, 1967, or the period of twelve months commencing on each first day of January thereafter.

3. "Retirement Annuity" means the Annuity which may be purchased or provided hereunder for an employee, his Contingent Annuitant, or beneficiary. The term "provided" when used in connection with Retirement Annuity is applicable only prior to the date of termination of the Pension Administration Fund. The term "purchased" when used in connection with Retirement Annuity is applicable only on the date of termination of such Fund.

4. "Normal", when used in conjunction with any designated Retirement Annuity payable to an employee, means the designated Annuity which may commence on his Normal Retirement Date if he is then living and if at that time an Optional Form of Retirement Annuity is not in effect with respect to such employee.

5. "Normal Retirement Date" means the date on which the first Retirement Annuity payment with respect to any particular Retirement Annuity payable hereunder normally will be made to an employee if he is then living and if at that time the option for the commencement of Retirement Annuity payments at another date is not in effect with respect to him. The Normal Retirement Date with respect to

(i) a male employee shall be the first day of the month next following the month in which the sixty-fifth birthday of the employee occurs, unless his date of birth is the first day of a month, in which event his Normal Retirement Date shall be his sixty-fifth birthday,

(ii) a female employee, with respect to the amount of Retirement Annuity, if any, cancelled on her account on January 1, 1968, shall be the first day of the month next following the month in which the sixtieth birthday of the employee occurs, unless her date of birth is the first day of a month, in which event her Normal Retirement Date shall be her sixtieth birthday, and

(iii) with respect to that portion of her Retirement Annuity provided on and after January 1, 1968 in accordance with the Plan, shall be the first day of the month next following the month in which the sixty-fifth birthday of the employee occurs unless her date of birth is the first day of a month, in which event her Normal Retirement Date shall be her sixty-fifth birthday.

6. "Optional Retirement Date" means the date other than the Normal Retirement Date as of which the first Retirement Annuity payment with respect to any particular Retirement Annuity payable hereunder actually will be made to an employee if he is then living and if the appropriate option herein has been exercised.

7. "Annuity Accrual Date" means the Normal Retirement Date of an employee, with respect to any particular Retirement Annuity payable to him, unless an earlier Optional Retirement Date is in effect with respect to such particular Retirement Annuity, in which event 'Annuity Accrual Date' means such earlier date.

8. The Annuity Commencement Date of an employee shall be the first day of the month on which the first Retirement Annuity payment will be made with respect to an employee.

9. "Employee's Contribution" means the amount contributed hereunder in each Contract Year or portion thereof prior to January 1, 1968 by an employee in accordance with Part A, Part B, Part C, Part D and Part E of this Contract as in effect on December 31, 1967.

10. "Employee's Accumulation" on any date means an amount equal to the sum of the aggregate of the Employee's Contributions of an employee which have been received by the Company hereunder prior to such date, and

(a) interest thereon prior to January 1, 1968 computed in accordance with, Part A, Part B, Part C, Part D or Part E whichever is applicable, of this Contract as in effect on December 31, 1967, and

(b) interest thereon on and after January 1, 1968 at the effective rate of three and one-half per cent per annum, compounded annually, computed separately, from such date; provided, however, on and after the date of termination of the Fund in accordance with Section 7 of Article III, interest from such date will be computed in accordance with (a) above, to the first day of the month in which the date specified in (a), (b) and (c) below occurs, whichever is applicable, but in no event later than the date specified in (c) below.

(a) The date of death of the Employee.

(b) The date of the employee's election of a cash surrender value.

(c) The Annuity Commencement Date of the employee.

11. "Contribution" means the amount of the payment due the Company from the Employer on any date in accordance with Section 1 of Article III, to maintain either the Pension Administration Fund or the Supplemental Fund.

12. "Pension Administration Fund" hereinafter sometimes called the Fund, means the account, in the Company's General Investment Account, to which are credited the amounts described in the first and last paragraphs of Section 1 of Article III on account of Retirement Annuities cancelled on January 1, 1968, and in which Contributions, including Employee's Accumulations, are to be accumulated hereunder after December 31, 1967 and against which deductions, additions and adjustments are to be made hereunder in accordance with Sections 1, 2, 3 and 7 of Article III.

13. "Supplemental Fund" means the fund which participates on a pooled basis directly in the investment experience of the "Separate Investment Account", and in which Contributions, exclusive of Employees' Contributions, made thereto are to be accumulated and against which deductions, additions and adjustments are to be made in accordance with Section 10 of Article III.

14. "Separate Investment Account" means the separate investment account for pension contracts maintained by the Company on a pooled basis in accordance with applicable law.

15. "General Investment Account" means the general investment account maintained by the Company for all assets which are not assigned to and made part of the "Separate Investment Account".

16. "Consideration" means the amount to be deducted from the Fund on and after January 1, 1968 and applied to purchase a Retirement Annuity for an employee, a Contingent Annuitant or a beneficiary on the first day of the month on which termination of the Fund occurs.

17. "Valuation Date" means December 31 of each calendar year commencing on or after January 1, 1968, and such other dates as of which the Company elects to determine whether the amount in the Pension Administration Fund exceeds the Liabilities of the Fund.

18. "Contingency Account" means the account to which an amount, determined by the Company in accordance with its regular procedures in effect at the time such determination is made for contracts in the same class as this Contract, is credited as of January 1, 1968 and from which an amount equal to any divisible surplus attributable to this Contract and apportioned in accordance with Section 7 of Article V will be deducted. All monies in such account shall be held as part of the general corporate funds of the Company.

19. Gender - Wherever a masculine pronoun is used herein, it shall be deemed, in all instances where appropriate, to mean the feminine pronoun as well.

20. "Termination of Employment Date" of an employee means a date occurring on or after January 1, 1968 and prior to the Annuity Accrual Date of the employee and specified by the Retirement Committee in a written notice filed with the Company at its Home Office as of which the employee ceases, otherwise than by death, to be in the employ of the Employer.

21. The word "employee" as used herein means any person in the employ of the Employer included under the Plan and classified by the Retirement Committee as eligible for coverage under this Contract or any other person who has ceased to be in the employ of the Employer for whom a Retirement Annuity is to be provided.

22. "Contingent Annuitant" means the person to whom Retirement Annuity payments are to be made for life after the death of the employee in accordance with the Option of Continuance of Retirement Annuity to Contingent Annuitant.

23. The term "Employer" means the Sperry Rand Corporation as defined in Section 1.3 of Article I of the Sperry Rand Retirement Program.

24. The term "Plan" means Part A of the "Sperry Rand Retirement Program" as it applies to employees in groups #1, #2 and #6, as in effect January 1, 1968 and as it may be amended from time to time thereafter.

25. "Social Security Commencement Date" means the date on which it is expected that the employee will become entitled to old age insurance benefits under the Social Security Act, which date for the purposes hereof shall be limited to either the first day of the calendar month coincident with or next following the sixty-second birthday of the employee or the first day of the calendar month coincident with or next following the sixty-fifth birthday of the employee, and such date shall be determined by the Retirement Committee at the time when the Option of Increased Retirement Annuity Payments to Social Security Commencement Date is requested by the employee.

26. The term "Retirement Committee" means the committee appointed by the Board of Directors in accordance with the Plan. In those areas where the Retirement Committee has the authority under this Contract to act, the John Hancock shall be entitled to rely on notices, forms, or other correspondence supplied by the Retirement Committee. The John Hancock shall be liable only for the obligations contained in this Contract and shall have no responsibility whatsoever to ascertain the propriety of any action taken at any time by the Retirement Committee. The Employer shall notify the John Hancock of the names of the members of the Retirement Committee or its duly authorized representatives and the John Hancock shall be entitled to rely on signatures of those persons until such time as the Employer notifies the John Hancock of changes in membership of the Retirement Committee or its duly authorized representatives.

ARTICLE II. DATES OF COVERAGE AND PLAN OF BENEFITS

SECTION 1. Dates of Coverage

Each employee, Contingent Annuitant or beneficiary covered under this Contract on January 1, 1968 shall continue to be covered under this Contract as amended effective January 1, 1968, if then living.

Each other employee included under the Plan shall become covered under this Contract only when a Retirement Annuity is provided or purchased for him. An annuity shall be provided or purchased for an employee on his Annuity Commencement Date, if he is then included under the Plan and if termination of the Fund has not previously occurred in accordance with the provisions of Section 7 of Article III.

On or before the date an employee is to become covered hereunder, the Retirement Committee shall furnish the Company with a written notice in the form to be agreed upon between the Retirement Committee and the Company, which shall specify

(a) the name, date of birth and proof thereof, and sex of the employee and Contingent Annuitant, if any, and

(b) such other information and data with respect to such employee and Contingent Annuitant or beneficiary as the Company deems necessary to provide for the coverage of the employee, the Contingent Annuitant or beneficiary.

SECTION 2. Retirement Annuity

A. The yearly amount of Retirement Annuity to be provided or purchased hereunder for each employee, Contingent Annuitant or beneficiary to whom the Company has commenced

Retirement Annuity payments prior to January 1, 1968 shall be equal to the yearly amount of Retirement Annuity which was in effect on his account on December 31, 1967.

B. The yearly amount of Retirement Annuity to be provided or purchased hereunder for an employee included under the Plan whose Normal Retirement Date occurs on and after January 1, 1968 to whom Retirement Annuity payments are to commence on or after his Normal Retirement Date, shall be equal to the sum of (i) and (ii) below; provided, however, in the case of an employee who is covered hereunder on January 1, 1968 but is not included under the Plan such amount shall be equal to (i) below:

(i) The yearly amount of Normal Retirement Annuity which was purchased and in effect on his account on December 31, 1967.

(ii) The yearly amount of Normal Retirement Annuity, if any, to which he is entitled in accordance with the Plan, exclusive of the yearly amount of Normal Retirement Annuity, if any, applicable to him in accordance with (i) above, as determined by the Retirement Committee, in accordance with the Plan.

For purposes of the first sentence of this sub-section it shall be deemed in the case of a female employee with respect to whom more than one Normal Retirement Date is in effect, that the Normal Retirement Date referred to is the later of the two Normal Retirement Dates.

C. If Retirement Annuity payments to the employee are to commence on an earlier Optional Retirement Date in accordance with Section 3 of Article IV, then in lieu of the Normal Retirement Annuity described above, the employee shall be entitled to a reduced yearly amount of Retirement Annuity equal to the sum of (iii) and (iv) below:

(iii) A yearly amount of Retirement Annuity equal to the product of (i) above and the appropriate percentage determined from Table C of Article VI of Part A, Part B, Part C, Part D, or Part E of this Contract, as in effect as of December 31, 1967, whichever is applicable.

(iv) The yearly amount of Retirement Annuity to which the employee is entitled on his earlier Optional Retirement Date in accordance with the Plan, as determined by the Retirement Committee exclusive of the yearly amount of Retirement Annuity, if any, applicable to him in accordance with (iii) above.

D. If Retirement Annuity payments are to commence on a later Optional Retirement Date in accordance with Section 3 of Article IV and such later Optional Retirement Date occurs on and after January 1, 1968 and prior to the date of termination of the Fund, the employee shall be entitled to have provided or purchased for him a yearly amount of Retirement Annuity equal to the yearly amount of Normal Retirement Annuity applicable to the employee on his Normal Retirement Date in accordance with sub-section B above.

E. In no event shall the yearly amount of Retirement Annuity provided or purchased hereunder for an employee on his Annuity Commencement Date be less than that which can be provided or purchased by his Employee's Accumulation on his Annuity Commencement Date by the application of the appropriate rate in Table 1 of Article VI, appropriately adjusted if an Optional Form of Retirement Annuity is in effect; and in the case of an employee who was covered hereunder on December 31, 1967, in no event shall the yearly amount of Retirement Annuity provided or purchased hereunder for the employee on his Annuity Commencement Date be less than that which was in effect hereunder on his account on December 31, 1967, appropriately adjusted if an earlier Optional Retirement Date or an Optional Form of Retirement Annuity is in effect.

F. Wherever in this Section reference is made to an amount of Retirement Annuity being determined in accordance with the Plan, such determination for the purposes of this Contract shall be made solely by the Retirement Committee and shall be specified by the Retirement Committee in a written notice filed with the Company at its Home Office on or before the date such Retirement Annuity is to be provided or purchased. Such notice shall also include such other information concerning the employee as may be required by the Company for carrying out the provisions of this Contract.

G. Notwithstanding anything contained herein to the contrary,

(a) if an Optional Form of Retirement Annuity is in effect with respect to an employee, the yearly amount of Retirement Annuity to be provided or purchased hereunder for such employee shall be appropriately adjusted in accordance with the provisions of such Optional Form of Retirement Annuity and the amount of Retirement Annuity if any, attributable to Retirement Annuities cancelled on January 1, 1968 shall be determined in accordance with Part A, Part B, Part C, Part D, or Part E, whichever is applicable, of this Contract as in effect on December 31, 1967, and based on factors furnished by the Company using the name mortality and interest assumptions as in effect on December 31, 1967, and

(b) if the Termination of Employment Date of an employee has occurred, the yearly amount of Retirement Annuity to be provided or purchased hereunder for the employee shall be governed also by the applicable provisions of Section 6 of Article IV.

ARTICLE III. CONSIDERATIONS

SECTION 1. Contributions to the Pension Administration Fund and the Supplemental Fund

The Employees' Accumulations with respect to Employees' Contributions received by the Company prior to January 1, 1968 which are being held by the Company on January 1, 1968 shall be credited to the Pension Administration Fund on January 1, 1968 as part of the amount credited to the Pension Administration Fund as of January 1, 1968 in accordance with the last paragraph of this Section.

The aggregate amount of Contributions to be paid to the Company by the Employer in each Contract Year or portion thereof on and after January 1, 1968 and placed in the Fund and in the Supplemental Fund may, within the limitations set forth herein, be paid at such times during the Contract Year as the Employer determines.

Except as may otherwise be agreed to in writing between the Employer and the Company, the aggregate amount of Contributions to be paid to the Company by the Employer in each Contract Year or portion thereof on and after January 1, 1968 and the portions of such Contributions to be placed in the Fund and in the Supplemental Fund in each such Contract Year or portion thereof shall be as determined by the Employer within the limitations and subject to the conditions set forth herein. The aggregate amount of such Contributions, including amounts added to the Fund or the Supplemental Fund during such Contract Year or portion thereof in accordance with Section 7 of Article V shall not exceed the amount specified below under the heading "Maximum Limitation" and shall not be less than the amount specified below under the heading "Minimum Limitation".

Maximum Limitation

The sum of (i) twice the amount which the Company estimates is necessary for normal costs for such

Contract Year on account of employees included under the Plan who have not attained their Annuity Commencement Dates at the commencement of such Contract Year, and (ii) 20% of any past service costs attributable to any increases in benefits to employees provided by amendments to the Plan and determined on the effective dates of each such amendment.

Minimum Limitation

The amount which the Company determines is necessary to increase the Fund and the Supplemental Fund so that

(i) the amount in the Fund will equal the Liabilities of the Fund at all times during such Contract Year, and

(ii) the amounts in the Fund and in the Supplemental Fund together will equal 105% of the Liabilities of the Fund at all times during such Contract Year.

As used in this paragraph

(iii) normal costs for any year are the current service costs applicable to such year of the Retirement benefits which the Company estimates may become payable under this Contract, and

(iv) past service cost at any time with respect to employees who have not attained their Annuity Commencement Dates is the amount which would be required at such time to meet the cost of all the retirement benefits which the Company estimates may become payable under this Contract to such employees and which would not be met by future normal costs.

The Company agrees to furnish estimates of normal and past service costs according to what it believes to be sound actuarial principles. However, on request of the Retirement Committee in lieu thereof, the Company will accept estimates of normal and past service costs furnished on a basis approved by the Company by any individual partnership, firm or corporation which is designated by the Employer and satisfactory to the Company. Such individual, partnership, firm or corporation may be changed from time to time by the Retirement Committee. However, the liability of the Company for the payment of Retirement Annuities is limited to the extent that Annuities have been provided in accordance with Section 2 of this Article for employees who have attained their Annuity Commencement Dates, for Contingent Annuitants or beneficiaries to whom Retirement Annuity payments are being made, or have been purchased on termination of the Fund for such employees, Contingent Annuitants or beneficiaries, and the Company assumes no responsibility of the sufficiency of the Fund to provide or purchase Annuities for employees as they attain their Annuity Commencement Dates, for Contingent Annuitants or for beneficiaries of such employees.

Notwithstanding anything contained herein to the contrary, on January 1, 1968 all Retirement Annuities then in effect hereunder are cancelled and an amount equal to the sum of (a), (b), (c) and (d) below will be credited to the Fund.

(a) The actuarial reserves on account of such Retirement Annuities held by the Company with respect to this Contract on December 31, 1967, based on the following mortality and interest assumptions:

(1) Retirement Annuities purchased on the July 1938 and on the March, 1941 rate basis:

The 1937 Standard Annuity Table (Males) unrated for males and rated at an age five years younger for females, with no loading, and interest at 2 1/2%.

(ii) Retirement Annuities purchased on the October 1959 rate basis:

The Group Annuity Table for 1951 (Males), projected to 1959 by Scale C and rated at an age one year younger for males and six years younger for females, with no loading, and interest at 3%.

(b) The reserves held by the Company for any amounts payable by the Company on or before December 31, 1967 and which are unpaid on January 1, 1968.

(c) The amount of any Employer's surrender values which have not been applied on or before December 31, 1967 in accordance with Section 7 of Article IV of this Contract as in effect on December 31, 1967.

(d) The amount of any Retirement Annuity payments being held by the Company on December 31, 1967 on account of employees who have attained their Normal Retirement Dates but not their later Operational Retirement Dates in accordance with Section 9 of Article IV of this Contract as in effect on December 31, 1967.

SECTION 2. Pension Administration Fund

On the first day of each month after January 1, 1968 and on or before the date of termination of the Fund, an Annuity shall be provided hereunder (i) for each employee, including his Contingent Annuitant, if any, entitled thereto who then attains his Annuity Commencement Date, (ii) for each Contingent Annuitant entitled thereto to whom Retirement Annuity payments are then to commence in accordance with option (A) of Section 4 of Article IV and (iii) for each beneficiary entitled thereto to whom Retirement Annuity payments are then to commence in

accordance with option (C) of Section 4 of Article IV. If on any first day of the month the amount in the Fund in excess of the Liabilities of the Fund is not sufficient to permit the increase in such Liabilities necessary to provide such Annuity, then unless the payment of Contributions has been discontinued in accordance with Section 7 of this Article, a Contribution sufficient to increase the Fund to such amount shall immediately be due and payable and the Company shall give the Employer written notice thereof. If such Contribution is not paid or transferred from the Supplemental Fund when due, subject to the provisions of Section 5 of this Article, only the pro rata portion of such Annuities to be provided on such date shall be provided as such excess is sufficient to provide, and the Company may cause the payment of Contributions to be discontinued and the Fund terminated in accordance with Section 7 of this Article.

The Company shall re-determine on each Valuation Date on or before the date of termination of the Fund the Liabilities of the Fund, using on account of an employee, Contingent Annuitant and beneficiary to whom Retirement Annuity payments are then being made, the same rate basis and Table in Article VI as was applicable on the date an Annuity first became payable to the employee, Contingent Annuitant or beneficiary, whichever is applicable; provided, however, that with respect to any amount of annuity which was cancelled on January 1, 1968, in accordance with Section 1 of this Article, the rate basis and Tables in Article VI which were applicable on January 1, 1968 shall be used unless otherwise agreed upon between the Employer and the Company. If on any Valuation Date prior to the discontinuance of the payment of Contributions in accordance with Section 7 of this Article, the Company determines that the amount in the Fund does not exceed the Liabilities of the Fund, then a Contribution sufficient to make the amount in the Fund exceed the Liabilities of the Fund shall immediately be due and payable and the Company shall give the Employer written notice thereof. If on any Valuation Date prior to the discontinuance of the payment of Contributions in accordance

with Section 7 of this Article, the Company determines that the amount in the Fund and the amount in the Supplemental Fund together do not exceed 105% of the Liabilities of the Fund, then a Contribution sufficient to make the amounts in the Fund and in the Supplemental Fund exceed 105% of the Liabilities of the Fund shall immediately be due and payable and the Company shall give the Employer written notice thereof. If such Contributions are not paid or transferred from the Supplemental Fund when due, subject to the provisions of Secton 5 of this Article, the Company may cause the payment of Contributions to be discontinued and the Fund terminated in accordance with Section 7 of this Article. The Company's determination of the amount in the Fund and the Liabilities of the Fund on any Valuation Date shall be conclusive for the purposes of this Contract.

Prior to the termination of the Fund, payments shall be made from the Fund as follows:

(a) In the event of the death of an employee or the last survivor of the employee and the Contingent Annuitant if the Option of Continuance of Retirement Annuity to Contingent Annuitant is in effect, the Company shall deduct from the Fund and pay to the beneficiary of the employee in one sum the amount of death benefit payable in accordance with the first or the second paragraph of Section 5 of Article IV. The Company shall also deduct from the Fund and pay in one sum to the person entitled thereto any commuted value of payments which become payable under the provisions of option (C) of Article IV upon the death of an employee or beneficiary of the employee.

(b) Upon receipt by the Company at its Home Office of notice of the employee's election of a cash surrender value in accordance with Section 6 of Article IV, the Company shall deduct from the Fund and pay to the employee the amount of cash surrender value payable in accordance with such Section.

(c) Upon receipt by the Company at its Home Office of the Retirement Committee's request for the payment of a death benefit in accordance with the third paragraph of Section 5 of Article IV, the Company shall deduct from the Fund and pay to the beneficiary of the employee the amount of death benefit payable in accordance with such paragraph.

(d) On each first day of the month the Company shall deduct from the Fund and pay to each employee, Contingent Annuitant, or beneficiary covered hereunder for whom a Retirement Annuity has been provided on or before such first day of the month the amount of Retirement Annuity payment due the employee, Contingent Annuitant, or beneficiary on such date, or the amount of settlement due the employee in accordance with Section 1 of Article IV, whichever is applicable.

No payment shall be made from the Fund in accordance with this Section on or after the date of termination of the Fund. Upon such termination all amounts in the Fund shall be used in accordance with Section 7 of this Article.

As used in this Contract, the term "Liabilities of the Fund" on any specified date means the sum of (A), (B) and (C) below.

(A) Any due and unpaid amounts chargeable to the Fund in accordance with this Contract.

(B) The Considerations specified below which would have to be deducted from the Fund to purchase the benefits in (a) and (b) below.

(a) The sum of (i) and (ii) below

(i) The Considerations required to purchase the annuities cancelled on

January 1, 1968, if any, on account of each employee who has not reached his Annuity Commencement Date, exclusive of the portion of such annuities to which the employee is no longer entitled as the result of the operation of Section 6 of Article IV.

(ii) The Consideration required to purchase the portion of the Retirement Annuity arising from the annuities cancelled on January 1, 1968, if any, payable on account of each employee, Contingent Annuitant, and beneficiary to whom the Company is then making annuity payments and on account of the Contingent Annuitant of such employee.

(b) The Considerations required to purchase the Retirement Annuity, exclusive of the portion, if any, of such Retirement Annuity described in (ii) of (a) above, payable on account of each employee, Contingent Annuitant or beneficiary to whom the Company is then making annuity payments, and on account of the Contingent Annuitant of such employee.

For this purpose the Considerations are calculated by the use of Tables 2a, 4a, 5a, 6a, and 7a of Article VI for the benefits described in (b) above, and are calculated by the use of Tables 2b, 3b, 4b, 5b, 6b and 7b of Article VI for the benefits described in (a) above. (Tables 2a and 2b relate to immediate life annuities; Table 3b relates to deferred life annuities; Tables 4a and 4b

relate to reversionary life annuities, Tables 5a and 5b relate to immediate life annuities with a certain and continuous period, Tables 6a and 6b relate to immediate annuities for a certain period and Tables 7a and 7b relate to a temporary life annuity. The application of the Tables and the annuities to which they apply are described in Section 13 of Article V and in the headings of the Tables.)

(C) The excess, if any, of (c) over (d) below.

(c) The amount, if any, by which the Considerations in (B) above for the benefits described in (a) above if determined by the use of Tables 2c, 3c, 4c, 5c, 6c and 7c of Article VI exceed the corresponding Considerations if determined by the use of Tables 2b, 3b, 4b, 5b, 6b and 7b of Article VI, respectively.

(d) the amount in the Contingency Account on such specified date.

SECTION 3. Adjustments of Pension Administration Fund

The Company shall add to the Fund, as of each December 31st subsequent to January 1, 1968, the Fund's share and the Contingency Account's share of the net interest earned and apportioned to the Group Annuity Branch of the Company for the calendar year ending on such December 31st, less 1% of such share.

The Company shall add to or deduct from the Fund, whichever is applicable, as of each December 31st subsequent to January 1, 1968, the Fund's share and the Contingency Account's share of the capital gains and losses arising from the investment transactions of the Company during the calendar year

ending on such December 31st which are apportioned to this call of contract for such year.

Notwithstanding anything contained herein to the contrary, the Company guarantees that the Fund on any date will not be less than it otherwise would have been if the sum of the net interest earned and capital gains and losses apportioned to the Fund had always been zero from January 1, 1968.

The Company shall deduct from the Fund during each calendar year the total expenses and taxes which are incurred or allocated under this Contract for such year or portion thereof, exclusive of the expenses and taxes which are deductible from the Supplemental Fund.

The interest, capital gains or losses, expenses and taxes to be allocated to this Contract and apportioned to the Fund in any year shall be determined by the Company in accordance with its regular procedures in effect at the time such determination is made for contracts in the same class as this Contract and such determination shall be conclusive for purposes of this Contract.

In lieu of the exact determination of the adjustments to be made in the Fund on December 31st in a calendar year, the Company may substitute an approximate method of determination, in which event an exact determination shall be made as soon as the Company has established the necessary facts, and adjustments made in the Fund on the preceding December 31st shall be appropriately modified. On the date of termination of the Fund, however, the Company may determine on an approximate basis adjustments to be made in the Fund in accordance with this Section for the portion of the calendar year completed on such date and such adjustments shall be conclusive for purposes of this Contract.

After the date of termination of the Fund, no further adjustments therein shall be made in accordance with this Section.

SECTION 4. Payment of Contributions

All Contributions due the Company hereunder are payable by the Employer, on their respective due dates, at the Home Office of the Company or to a duly authorized representative presenting the official receipt signed by the President or Secretary and countersigned by the representative designated on such receipt.

Notwithstanding anything contained herein to the contrary, the Company shall be liable for any amount expressed to be payable only to the extent to which the appropriate Contributions therefor have been received by the Company.

SECTION 5. Grace Period

A grace period of thirty-one days without interest, during which time this Contract shall remain in effect, will be granted to the Employer for the payment of all Contributions provided the Employer has not, previous to the due date of the last such unpaid Contributions, given written notice to the Company that the payment of Contributions hereunder is to be suspended or discontinued as of such due date.

If any Contributions due hereunder are not paid by the Employer to the Company before the expiration of the grace period, the status of this Contract shall thereafter be the same as that set forth in Section 6 of this Article, unless and until action is taken by the Company in accordance with Section 7 of this Article.

SECTION 6. Suspension of Payment of Contributions.

The payment of Contributions hereunder may be suspended on and after the first day of any month specified by the Employer in a written notice filed with the Company at its Home Office not less than thirty-one days prior thereto; provided, however, such suspension shall not apply to any amounts due the Company in accordance with Section 2 of this Article. Any such

suspension of the payment of Contributions shall be with respect to all employees, or all employees of any specified class or classes covered under the Plan, and shall be for a period of not more than one year, during which period the operation of the Fund and the Supplemental Fund, including payments from the Fund, the determination of the Liabilities of the Fund and adjustments to the Fund and the Supplemental Fund shall continue in the same manner as if there had been no suspension. The Company may agree in writing to extend any such suspension for such further period or periods, of not more than one year each, as it may wish to grant.

If, due to the operation of Section 1 of this Article, Contributions are not due on any date, this of itself shall not be a suspension of the payment of Contributions hereunder.

Any suspension granted by the Company in accordance with this Section shall be without prejudice to any rights of the Company to make modifications hereof in accordance with Section 8 of Article V, and to make such modification effective as of any Contract Anniversary occurring during such suspension.

SECTION 7. Discontinuance of Payment of Contributions and Termination of the Pension Administration Fund

The payment of Contributions hereunder shall be discontinued with respect to all employees covered under the Plan on and after the first day of the month specified in a written notice which may be given:

(i) by the Employer to the Company that the payment of Contributions hereunder shall be discontinued with respect to such employees as of such date, notwithstanding any suspension of payment of Contributions that may then be in effect in accordance with Section 6 of this Article, provided such notice is received by the Company at its Home Office prior to such date, or

(ii) by the Company to the Employer, in event any Contribution then due is not paid on such date or within the grace period as set forth in Section 5 of this Article, or in event payment of Contributions hereunder is not then resumed subsequent to the expiration of any period or periods of suspension which may have become effective in accordance with Section 6 of this Article, or

(iii) by the Company to the Employer in event the Company has previously declared its intention to exercise its right to modify the terms hereof in accordance with Section 8 of Article V and the Employer has failed to assent to such modification, or

(iv) by the Company to the Employer, in the event the Plan shall be changed at any time and the Company in its sole discretion at that time determines that it is not sound business practice to continue to provide Retirement Annuities hereunder according to such changed Plan for employees who thereafter attain their Annuity Commencement Dates, or

(v) by the Company to the Employer, in the event that in any period of three consecutive Contract Years, the aggregate Contributions paid to the Company are less than an amount equal to 25% of the total contributions which the Employer makes for such period with respect to employees included under the Plan for whom benefits are to be provided under the Contract.

Discontinuance of the payment of Contributions shall not affect the terms or conditions of any Retirement Annuity already provided hereunder on account of an employee except as specifically provided in this Contract.

Notwithstanding the discontinuance of the payment of Contributions, the operation of the Fund and the Supplemental Fund, including payments from the Fund, the determination of the Liabilities of the Fund, and adjustments to the Fund and the Supplemental Fund, shall, unless otherwise agreed upon between the Employer and the Company, continue until the date of termination of the Fund, which date shall be the earliest of the following dates:

(a) The first day of a month specified in a written notice which may be given by the Company to the Employer in the event that on any Valuation Date, on or after discontinuance of the payment of Contributions in accordance with the first paragraph of this Section, the total amount in the Fund does not exceed the Liabilities of the Fund.

(b) The transfer Date as defined in Section 9 of this Article.

(c) Such other first day of a month on or after the discontinuance of the payment of Contributions in accordance with the first paragraph of this Section as may be agreed upon in writing between the Employer and the Company

On the date of termination of the Pension Administration Fund the Company shall deduct from the Fund an amount equal to item (A) of the Liabilities of the Fund as described in the last paragraph of Section 2 of this Article and shall apply the amount in the Fund equal to item (B) of the Liabilities of the Fund described in the last paragraph of Section 2 of this Article as a Consideration to the purchase of the Retirement Annuity of each employee, Contingent Annuitant, and beneficiary with respect to whom an amount is included in the Liabilities of the Fund on such date. The amount of Retirement Annuity to be purchased by such Consideration shall be equal to the

amount of Retirement Annuity used to establish the Liabilities of the Fund with respect to such employee, Contingent Annuitant, or beneficiary on the date of termination of the Fund. The amount in the Fund equal to item (C) of the Liabilities of the Fund shall be withdrawn and retained by the Company as a contingency reserve item.

The termination of the Fund shall not affect the amount or the terms of any Retirement Annuity being paid to the employee, Contingent Annuitant, or beneficiary on such date. The terms of any deferred Normal Retirement Annuity purchased in accordance with the immediately preceding paragraph of this Section on account of Annuities cancelled on January 1, 1968 shall be the same as were applicable to the comparable annuities so cancelled, as described in the provisions of this Group Annuity Contract as in effect on December 31, 1967. The terms of any other deferred Normal Retirement Annuity purchased in accordance with this Section shall be determined by the Company and upon request of the Employer shall be described in an amendment hereto.

If the termination of the Fund occurs in accordance with subparagraph (c) of the second paragraph of this Section, any balance then remaining in the Fund after making the applications described in the fourth paragraph of this Section and after recognizing any transfer from the Supplemental Fund and after deducting an amount equal to item (A) of the Liabilities of the Fund as described in the last paragraph of Section 2 of this Article, may be applied to purchase deferred Normal Retirement Annuities hereunder in a manner to be determined by mutual written agreement between the Employer and the Company.

The provisions of this Section may apply separately to any specified class or classes of employees included under the Plan but without effect upon the payment hereunder of Contributions with respect to any other employees.

If discontinuance of the payment of Contributions is not for all employees, the Employer shall notify the Company what portion of the Fund and the Supplemental Fund is attributable to

employees with respect to whom such payment of Contributions is to be discontinued, and thereafter the payment of any Retirement Annuities for such employees shall be made only from the portion of the Fund which the Employer so notified the Company was attributable to such employees.

This Contract shall finally terminate when the Company shall have completed all payments due under this Contract. If at such time there is a balance in the Fund, the Company shall pay or apply such balance in a manner to be determined by mutual agreement between the Employer and the Company.

SECTION 8. Continuation of Plan with Another Carrier

If within ninety days following the discontinuance of the payment of Contributions in accordance with Section 7 of this Article the Company receives written notice at its Home Office from the Employer specifying

(a) that the Employer has a retirement plan under another Group Annuity Contract issued by the Company to the Employer or with another insurance company or a trustee under which benefits are being provided for employees of the Employer included under the Plan,

(b) the name and address of such other insurance company or trustee, and

(c) that said retirement plan is one which in the opinion of the Employer meets the applicable requirements of Section 401 of the Internal Revenue Code or acts amending or replacing such Section,

then notwithstanding anything contained in Section 7 of Article III or sub-section II of Section 6 of Article IV, such Section will be operative as if the payment of Contributions had not been discontinued but were suspended, until the earlier of the

dates specified in the next following paragraph; provided, however, that the provisions of this paragraph shall not apply to that portion, if any, of the Retirement Annuity provided for an employee which arises from Retirement Annuities purchased prior to January 1, 1968 under this Contract as in effect on December 31, 1967.

In the event the provisions of the first paragraph of this Section have become operative, they shall subsequently cease to apply and the discontinuance of the payment of Contributions shall be deemd to occur for the purposes of Section 7 of this Article and sub-section II of Section 6 of Article IV on whichever of the following dates first occurs:

(d) The first day of the month following receipt by the Company at its Home Office of a written notice from the Employer that the Employer no longer has a retirement plan which meets the requirements of (a) and (c) of this Section.

(e) The ninetieth day following the mailing by the Company to the Employer of a request for written notice from the Employer specifying the information shown in (a), (b) and (c) of this Section in the event that within such ninety-day period the Company does not receive such notice at its Home Office.

(f) The transfer date as defined in Section 9 of this Article.

SECTION 9. Transfer of Pension Administration Fund

If the Employer files with the Company at its Home Office written notice specifying

(a) that the Employer has in force a retirement plan with another insurance Company or trustee under which benefits are being, or will be, provided for employees of the Employer included under the Plan,

(b) the name and address of such insurance company or trustee, and

(c) that said retirement plan is one which, in the opinion of the Employer, meets the applicable requirements of Section 401 of the Internal Revenue Code of 1954 or acts amending or replacing such Section,

the Company shall, provided the date of termination of the Fund has not previously occurred, deduct the Transferable Balance of Fund from the Fund on the Transfer Date. The Transferable Balance of Fund shall be an amount equal to the excess, if any, of the portion of the balance in the Fund over the Liabilities of the Fund on such date.

On the Transfer Date the Company shall transfer to the insurance company, or the trustee specified by the Employer in accordance with this Section, the Transferable Balance, increased or decreased, as the case may be, by the Asset Liquidation Adjustment described below.

The Asset Liquidation Adjustment on the Transfer Date shall be equal to (d) or (e) below, whichever is applicable.

(d) The amount, if any, which the Company, in accordance with uniform procedures applicable to all contracts of this class, determines would be required to cover the investment losses to the Company resulting from making payment of the amount to be transferred on that date, assuming it was necessary to liquidate investments to provide such amount.

(e) The amount, if any, which the Company, in accordance with uniform procedures applicable to all contracts of this class, determines would be the net capital gain to the Company resulting from making payment of the amount to be transferred

on that date, assuming it was necessary to liquidate investments to provide such amount.

When (d) is applicable, the Transferable Balance shall be decreased by the Asset Liquidation Adjustment. When (e) is applicable, the Transferable Balance shall be increased by the Asset Liquidation Adjustment.

The Asset Liquidation Adjustment shall be determined by the Company using such approximations as it deems equitable and appropriate on the basis of information most recently available for making such determination.

The Transfer Date shall be the first day of the month specified by the Employer in such written notice, provided that the Transfer Date must be at least ninety days after such notice is filed.

The Company shall be allowed a reasonable period after the Transfer Date in order to make the necessary computations and arrange for payment, and shall have the right to defer making transfer during any period when regular banking activities have been suspended, securities exchanges are closed or there is restricted trading on any stock exchange, or for any period when an emergency or other circumstance beyond the control of the Company exists and as a result of which the disposal of securities, including the sale or delivery thereof or receipt of payment by the Company is not reasonably practicable.

If the Company determines that the amount and character of any securities which are to be disposed of in order to make a transfer are such that the disposal could not be accomplished in an orderly manner without undue sacrifice as to price, or without undue expense, it may defer the making of a transfer for such period as it deems necessary, with the amount to be transferred being determined on the date of transfer. However, in lieu of such deferment, upon written request of the Employer, the Company will determine the amount to be transferred by segregating as a class for investment purposes, and for the apportionment of investment earnings, capital gains, capital losses, expenses and taxes, the securities it determines would be disposed

of in order to make the transfer. In the event of such segregation, the Company will also, if the Employer so requests, make the transfer wholly or partially in securities rather than in cash, transferring the securities which it determines would otherwise have been sold in order to make a cash payment. No such transfer of securities will be made, however, except as permitted by applicable laws.

If on the Transfer Date the Employer no longer has a retirement plan which meets the requirements of (a) and (c) above, or if on such date the insurance company or trustee specified in accordance with (b) above is not to receive payment under this Section and no other insurance company or trustee has been designated to receive such payment, the Company will hold the Transferable Balance until both requirements (a) and (c) are being met and an insurance company or trustee to receive such payment has been designated by written notice to the Company at its Home Office.

The provisions of this Section may apply separately to any specified class or classes of employees, in which event the Employer shall notify the Company what portions of the Fund are attributable to each specified class or classes of employees to which such provisions are to become applicable, and only such portions shall be used in determining the amounts to be deducted from the Fund with respect to each such specified class or classes of employees in accordance with the first paragraph of this Section.

Upon written request of the Employer filed with the Company at its Home Office, the Company shall, provided the payment of Contributions has not been discontinued in accordance with Section 7 of this Article, transfer a portion or all of the Transferable Balance from the Fund to the Supplemental Fund. Such transfer shall be made in the same manner and under the same conditions as would be applicable if such transfer were being made to a trustee or another insurance company; provided, however, the termination of the Fund shall not be deemed to occur on the Transfer Date.

In lieu of making payment in accordance with the provisions of this Section, payment may be made in such other manner and

amount and at such other time as may be agreed to in writing between the Employer and the Company.

If,

(i) on any date the Employer requests the Company to establish a Liability of the Fund for all Retirement Annuities accrued subsequent to January 1, 1968, as determined by the Employer in accordance with the Plan, for employees who have not attained their Annuity Commencement Dates, and

(ii) the Company determines that the balance in the Fund exceeds the Liabilities of the Fund after the establishment of such Retirement Annuities, then

such excess shall be considered the result of an actuarial error and such excess may be transferred, at the request of the Employer, in accordance with the provisions of this Section as a Transferable Balance of Fund. The termination of the Fund shall be deemed to occur on the date such transfer is made and on such date the Company shall deduct the Liabilities of the Fund from the Fund and shall apply an amount equal to item (B) of the Liabilities of the Fund as a Consideration to the purchase of the Retirement Annuity for each employee, Contingent Annuitant and beneficiary, with respect to whom an amount is included in the Liabilities of the Fund.

Any payment made by the Company in accordance with this Section shall constitute a full discharge of the liability of the Company with regard to the amount so paid.

SECTION 10. Supplemental Fund

A. Investment of Contributions to Supplemental Fund

The Employer shall, by filing written notice with the Company at its Home Office, specify the portion of each payment of Contributions for the Supplemental Fund which is to be

invested in whole or part in any one of the investment class or classes which is made available for such purpose from time to time by the Company in its Separate Investment Account. Any such direction shall remain in effect with respect to all Contributions to the Supplemental Fund until changed by the Employer with respect to future such Contributions in a prior written notice filed with the Company at its Home Office at least ninety days prior to the payment of Contributions to which such notice is to apply. Nothing contained in this Contract shall be construed to limit the right of the Company from time to time to establish a new investment class or classes or to withdraw, with respect to future contributions, any investment class or classes previously established in accordance with the investment policy established by the Company pursuant to a resolution of the Board of Directors. At the request of the Employer, the Company may establish at any time a non-pooled Separate Investment Account with respect to future contributions subject to the regular underwriting requirements of the Company then in effect at such time for such non-pooled Separate Investment Account.

B. Adjustments to Supplemental Fund

The Company shall add to the Supplemental Fund, as of the last day of each calendar month subsequent to December 31, 1967, the Supplemental Fund's share of the net investment income of each investment class of the Separate Investment Account in which the Supplemental Fund participates, without regard to the other investment income of the Company, less 1% of such share.

The Company shall add to or deduct from the Supplemental Fund, whichever is applicable, as of the last day of each calendar month subsequent to December 31, 1967, the Supplemental Fund's share of the capital gains and losses, realized and unrealized, of each investment class of the Separate Investment Account in which the Supplemental Fund participates, without regard to the other gains and losses of the Company.

The Company shall deduct from the Supplemental Fund as of the last day of each calendar month subsequent to December

31, 1967, the total administrative expenses and taxes on account of the Supplemental Fund which are incurred or allocated under this Contract for such month.

In lieu of, or in addition to, making adjustments to the Supplemental Fund as of the last day of each calendar month, as indicted above, adjustments may be made on other dates as determined by the Company.

Investment income, investment expenses and taxes, and changes in appreciation and depreciation in the Separate Investment Account shall be allocated to contracts in proportion to the market value of the individual finds held in the Separate Investment Account. If there is no readily available market value, the Company will determine a fair value of the individual funds in accordance with accepted practices. All investment allocations to and within the Separate Investment Account shall be determined by the Company in accordance with its regular procedures in effect at the time such determination is made, and such determination shall be conclusive for purposes of this Contract. The Company agrees to furnish the Employer not less than once each calendar year a statement showing the amount of the assets of his Supplemental Fund which is held in each class of investments of the Separate Investment Account.

In lieu of the exact determination of the adjustments to be made in the Supplemental Fund as of the last day of each calendar month, the Company may substitute an approximate method of determination, in which event an exact determination will be made as soon as the Company has established the necessary facts, and the approximate adjustments made in the Supplemental Fund shall be appropriately modified.

After the date the Supplemental Fund has been terminated, no adjustments to the Supplemental Fund shall be made in accordance with this Section.

C. Balance in Supplemental Fund

The balance in the Supplemental Fund at any time arising from Contributions to the Supplemental Fund, adjustments to the Supplemental Fund and transfers from the Supplemental Fund in accordance with sub-sections A, B and D, respectively, of this Section shall be determined by the Company in accordance with its regular procedures in effect at the time such determination is made for supplemental funds in its Separate Investment Account. Such determination shall be conclusive for purposes of this Contract.

D. Transfer of Supplemental Fund

Amounts may be transferred from the Supplemental Fund in the following manner and subject to the conditions in item (v).

(i) *Transfer to the Fund prior to Discontinuance of Payment of Contributions*

In the event, on any first day of the month, the balance in the Fund is such that a Contribution is required to maintain such balance above an amount equal to the Liabilities of the Fund, then, unless the Employer pays a Contribution sufficient therefor, or unless alternate instructions have been agreed to in writing between the Company and the Employer, the Company will transfer an amount sufficient therefor from the Supplemental Fund to the Fund.

The Employer shall notify the Company in writing of the class or classes of investments in its Separate Investment Account from which such transfer is to be made, but if no such notice has been received or if the class specified is inadequate to provide such Contribution, the Company shall have the right to select the class or classes from which such Contribution shall be withdrawn.

In addition to any transfers described in the first paragraph of this item (i), a part or all of the balance in the Supplemental Fund may, if so agreed upon in writing between the Employer and the Company, be transferred to the Fund.

(ii) *Transfer to another Insurance Company or Trustee*

The Company will, upon notice from the Employer, withdraw the balance in the Supplemental Fund after making all adjustments thereto on or before the date of withdrawal in accordance with sub-section B of this Section, and pay such balance to an insurance company or trustee, designated by the Employer, provided such notice also specifies the three conditions set forth in the first paragraph of Section 9 of this Article.

Notwithstanding anything contained herein to the contrary, discontinuance of payment of Contributions shall be deemed to have occurred on the first day of the calendar month next following the transfer of the balance of the Supplemental Fund to another insurance company or trustee in accordance with this Section, unless the Company and the Employer agree otherwise, in writing, prior to the date of such transfer.

(iii) *Transfer to the Fund After Discontinuance of Payment of Contributions*

In the event the payment of all Contributions hereunder is discontinued in accordance with Section 7 of this Article, the operation of the Supplemental Fund shall continue, prior to the termination of the Fund, in the same manner as if there had been no discontinuance of the payment

of all Contributions unless otherwise agreed upon in writing between the Employer and the Company before, on, or after the discontinuance of the payment of all Contributions. On termination of the Fund, the balance in the Supplemental Fund shall be transferred to the Fund and used in accordance with Section 7 of this Article, subject to such annuity purchase rates as the Company shall then determine.

(iv) *Transfer Between Investment Classes*

The Company will, upon notice from the Employer, transfer a part or all of the balance in the Supplemental Fund which is held in a particular class of investment in the Separate Investment Account to another investment class of such Account but, except as may result from transfers described in (i) of this sub-section, no such transfer shall be made without the consent of the Company more often than once in any twelve month interval with the amount of transfers in such twelve month interval not to exceed an amount equal to four times the sum of (a) the normal cost for such year as defined in the third paragraph of Section 1 of this Article, and (b) 10% of any past service costs attributable to any increases in benefits to employees, provided by amendments to the Plan and determined on the effective date of each such amendment.

(v) *Conditions of Transfer*

The transfers described in this sub-section D shall be subject to the following conditions:

(a) Any notice from the Employer for a transfer under (ii) and (iv) must be in writing and filed with the Company at its Home Office.

In the case of any investment class, which is invested primarily in common stock, such notice must be given at least thirty days prior to the date transfer is to be made. In the case of any other investment class, such notice must be given at least ninety days prior to the date the transfer is to be made. The Company, if it so elects, may waive the thirty or ninety day notice period. Except for transfers described in (ii) and (iii) of this sub-section, such notice shall specify the class or classes of investments in which the Supplemental Fund is invested from which transfer is to be made.

(b) Transfers will be made only as of the last working day of the month following expiration of either or both the thirty or ninety day advance notice period, whichever is applicable, with valuation of the amounts in the Supplemental Fund being made as of the day of transfer.

(c) The Company shall have a reasonable period upon the expiration of the thirty or ninety day advance notice period in order to make the necessary computations and arrange for payment and shall have the right to defer making transfer during any period when regular banking activities have been suspended, securities exchanges are closed or there is restricted trading on any stock exchange, or for any period when an emergency or other circumstance beyond the control of the Company exists and as a result of which the disposal of securities, including the sale, delivery thereof or receipt of payment by the Company is not reasonably practicable or it is not reasonably practicable

for the Company to determine fairly the value of the assets of the Supplemental Fund.

(d) If the Company determines that the amount and character of any securities which are to be disposed of in order to make a transfer are such that the disposal could not be accomplished in an orderly manner and without undue sacrifice as to price or without undue expense, it may defer the making of a transfer for such period as it deems necessary with the amount to be transferred being determined on the date of transfer. However, in lieu of such deferment, upon written request of the Employer, the Company will determine the amount to be transferred by segregating as a class for investment purposes, and for the apportionment of interest, capital gains, capital losses, expenses and taxes, the securities it determines would be disposed of in order to make the transfer. In the event of such segregation, the Company will also, if the Employer so requests and if the transfer is one which is to be made to another insurance company or to a trustee, make the transfer wholly or partially in securities rather than in cash, transferring the securities it determines would otherwise have been sold in order to make a cash payment. No such transfer of securities will be made, however, except as permitted by applicable laws.

Termination of the Supplemental Fund shall occur on the date the balance then remaining in the Supplemental Fund is disposed of either by transfer to another insurance company or trustee in accordance with item (ii) of this sub-section or by placing it in the Fund in accordance with item (iii) of this sub-section.

SECTION 11. Maximum Considerations Applicable to Certain Employees

Notwithstanding anything contained herein to the contrary, if on any date the Plan is terminated and a limitation must be placed upon payments to an employee in accordance with applicable United States Treasury Department regulations, then the company will cancel any Annuities which must be cancelled in accordance with the applicable provisions of the Plan, as of the ninetieth day following the date of such termination of the Plan, providing such employee is living on such ninetieth day. Such cancellation of Annuities shall have no effect on Retirement Annuity payments which have become payable prior to the date on which such cancellation becomes effective.

If the date of cancellation of Annuities is prior to the date of termination of the Fund, the amount included in the Liabilities of the Fund on account of the portion of the Annuities cancelled shall be released from the Liabilities of the Fund. If the date of cancellation of Annuities is on or after the date of termination of the Fund, an amount equal to the reserve on such cancelled Annuity computed on the basis of interest and mortality used in determining the Considerations therefor shall be applied as provided for in the immediately following paragraph. Payment of the portion of the yearly amount of Retirement Annuity which is still in force after any cancellation shall be continued in accordance with the provisions of this Contract.

The reserves released upon the cancellation of Annuity on or after the date of termination of the Fund, in accordance with the immediately preceding paragraph, shall be applied as of the date of such cancellation in a manner determined by the Company for the benefit of all employees or all employees of any specified class or classes covered hereunder on such date, as determined by the Employer in accordance with the Plan; provided, however, that such application shall not result in substantial discrimination in the favor of the more highly compensated employees covered hereunder on such date as a class. Any amount

applied in accordance with this paragraph for the benefit of an employee whose Annuity has been cancelled shall not result in the total amount of Annuity being provided or purchased for such employee which is greater than the maximum amount specified in the applicable United States Treasury Department regulations.

Not withstanding anything contained herein to the contrary, if on any date a limitation must be placed upon payments to an employee in accordance with applicable United States Treasury Department Regulations, and such limitation need be only a temporary one because of failure to meet the full current costs of the Plan, an amount, determined in accordance with the applicable provisions of the Plan, shall be withheld by the Company from each Retirement Annuity payment becoming payable to such employee on or after the forty-fifth day following the date such limitation becomes necessary and prior to the time when such full current costs have again been met or the Plan is terminated. Such withheld amounts shall be held by the Company until either the Plan has been terminated or the full current costs of the Plan have been met. If the Plan is terminated, such withheld amounts shall be applied in the same manner as is provided for in the immediately preceding paragraph of this Section. If the full current costs of the Plan are met, the Company will, at the direction of the Employer, make payment of such withheld amounts to the person or persons to whom such amounts would have been payable if such amount had not been withheld.

ARTICLE IV. RETIREMENT ANNUITY PROVISIONS

SECTION 1. Mode of Payment of Retirement Annuity

Retirement Annuity payments hereunder to any person shall be payable monthly if the yearly amount of Retirement Annuity payable to such person under this Contract is not less than $120, each monthly payment being one-twelfth of such yearly amount.

If the yearly amount of Retirement Annuity payable under this Contract to an employee is less than $120 but not less than $40, such Retirement Annuity shall be payable quarterly, each quarterly payment being one-fourth of such yearly amount.

If the yearly amount of Retirement Annuity payable under this Contract to an employee is less than $40, and termination of the Fund has not occurred, then in full settlement of such Retirement Annuity, a payment shall be made to the employee as of his Annuity Commencement Date equal to the amount included in the Liabilities of the Fund for such Retirement Annuity with respect to such employee on his Annuity Commencement Date.

SECTION 2. Retirement Annuity Commencing on Normal Retirement Date

The yearly amount of Normal Retirement Annuity which is payable to an employee covered hereunder shall be the yearly amount of Normal Retirement Annuity purchased or provided hereunder on his account which is in effect on his Normal Retirement Date.

The first Normal Retirement Annuity payment to be made to the employee shall be payable on his Normal Retirement Date if he is then living. Subsequent Normal Retirement Annuity payments to the employee shall be payable during his lifetime in accordance with Section 1 of this Article and shall cease with the last payment due prior to his death.

When the Option of Continuance of Retirement Annuity to Contingent Annuitant is in effect with respect to an employee, continuance of Retirement Annuity payments to his surviving Contingent Annuitant shall be governed by the applicable provisions of such option.

The provisions of this Section shall apply separately on account of a female employee on whose account Retirement Annuities were cancelled on January 1, 1968 with respect to the yearly amount of Normal Retirement Annuity described in (i) of sub-section B of Section 2 of Article II and the yearly amount of Normal Retirement Annuity described in (ii) of sub-section B of Section 2 of Article II.

SECTION 3. Retirement Annuity Commencing on an Optional Retirement Date

In lieu of Normal Retirement Annuity payments hereunder, an employee on written request of the employee alone, or of the Retirement Committee alone, filed with the Company at its Home Office, shall be entitled, provided he qualifies in accordance with the Plan, to Retirement Annuity payments for a reduced amount commencing on an earlier Optional Retirement Date, which date may be the first day of any month subsequent to the filing of such request; subsequent Retirement Annuity payments to the employee shall be payable during his lifetime in accordance with Section 1 of this Article and shall cease with the last payment due prior to his death; provided, however, the requirements for an earlier Optional Retirement Date as described in Section 3 of Article IV of Part A, Part B, Part C, Part D or Part E of this Contract, as in effect on December 31, 1967, will be applicable with respect to that portion, if any, of the Retirement Annuity attributable to Retirement Annuities cancelled on December 31, 1967. The yearly amount of Retirement Annuity payable hereunder to an employee commencing on his earlier Optional Retirement Date shall, provided such date is prior to the date of termination of the Fund, and provided an Optional Form of Retirement Annuity is not in effect with respect to him, be equal to the yearly

amount of Retirement Annuity, as determined in accordance with sub-section C of Section 4 of Article II, which is provided for the employee on such date.

In lieu of Normal Retirement Annuity Payments on written request of such employee and the Retirement Committee filed with the Company at its Home Office at least thirty days prior to the Normal Retirement Date of the employee, shall be entitled to Retirement Annuity payments commencing on a later Optional Retirement Date subsequent to the Normal Retirement Date of the employee. Such later Optional Retirement Date shall be the earliest of the following dates:

(i) The first day of the month following receipt by the Company at its Home Office of written notice from the Retirement Committee that the employee has retired from the active service of the Employer.

(ii) The date of termination of the Fund in accordance with Section 7 of Article III.

(iii) In the case of a female employee on whose account Retirement Annuities were cancelled on January 1, 1968, the first day of the month next following the month in which the sixty-fifth birthday of the employee occurs unless the date of birth is the first day of the month in which event the later Optional Retirement Date shall be the sixty-fifth birthday of the employee, unless a later Optional Retirement Date becomes effective with respect to any Normal Retirement Annuity to be provided for the employee in accordance with (ii) of sub-section B. of Section 2 of Article II in which event this item shall not be applicable.

Subsequent Retirement Annuity payments to the employee shall be payable during this Lifetime in accordance with Section 1 of this Article and shall cease with the last payment prior to his death. The yearly amount of Retirement Annuity payable hereunder to an employee commencing on his later Optional

Retirement Date shall, provided such date is prior to the termination of the Fund, and provided an Optional Form of Retirement Annuity is not in effect with respect to him, be equal to the amount of Retirement Annuity which is provided on his account on his Normal Retirement Date, determined in accordance with sub-section D. of section 2 of Article II.

Notwithstanding anything contained in this Contract to the contrary, a later Optional Retirement Date will become effective automatically with respect to each employee who remains in the regular active service of the Employer after his Normal Retirement Date provided such later Optional Retirement Date could otherwise become effective on written request of the Retirement Committee alone as provided in the immediately preceding paragraph. Each such employee shall be specified by the Retirement Committee in a written notice filed with the Company at its Home Office.

If the Option of Continuance of Retirement Annuity to Contingent Annuitants or the Option of Life Annuity with Payments for Five Years Certain is in effect with respect to an employee on whose account a Termination of Employment Date occurred prior to January 1, 1968, the Company shall have the right to require evidence satisfactory to itself of the good health of such employee before granting a request for an earlier Optional Retirement Date unless such earlier Optional Retirement Date is at least three years subsequent to the date written request therefor is filed with the Company at its Home Office.

When both an Optional Retirement Date and an Optional Form of Retirement Annuity are in effect with respect to an employee, Retirement Annuity payments hereunder shall be governed also by the applicable provisions of such Optional Form of Retirement Annuity.

The provisions of this Section shall, in the case of an employee on whose account Retirement Annuities were cancelled on January 1, 1968, apply separately with respect to the yearly amount of Normal Retirement Annuity described in (i) of

sub-section B. of Section 2 of Article II and the yearly amount of Normal Retirement Annuity described in (ii) of sub-section B. of Section 2 of Article II; provided, however, that payment of all Retirement Annuities with respect to such employee shall commence on the same date.

In the case of a female employee on whose account Retirement Annuities were cancelled on January 1, 1968 and for whom any Retirement Annuity is to be provided hereunder on and after January 1, 1968, in accordance with (ii) of sub-section B. of Section 4 of Article II, an earlier Optional Retirement Date shall automatically become effective with respect to such Retirement Annuity unless

(a) a prior earlier Optional Retirement Date becomes effective with respect to such employee in accordance with the foregoing provisions of this Section, or

(b) a later Optional Retirement Date becomes effective with respect to any Normal Annuities cancelled on January 1, 1968 on account of such employee and such later Optional Retirement Date is on or after the fifth anniversary of the Normal Retirement Date with respect to such Normal Annuities.

Such automatic earlier Optional Retirement Date shall be the Normal Retirement Date, or later Optional Retirement Date, whichever is applicable, with respect to any Normal Annuities cancelled on January 1, 1968.

SECTION 4. Optional Forms of Retirement Annuity

Subject to the conditions contained herein, the Company will grant any one of the Optional Forms of Retirement Annuity outlined under (A), (B) and (C) of this Section to an employee entitled thereto in accordance with the Plan; provided a written request for any such Optional Form of Retirement Annuity if filed with the Company at its Home Office prior to the employee's Normal Retirement Date or earlier Optional Retirement Date, if such is in effect.

(A) Option of Continuance of Retirement Annuity to Contingent Annuitant

In lieu of the amount of Retirement Annuity otherwise payable to an employee under this Contract, such employee on being granted this Option shall be entitled to a reduced amount of Retirement Annuity commencing on the same date as the Retirement Annuity otherwise payable to him with provision for the continuance of such reduced amount of Retirement Annuity or of a specified portion thereof after his death for life to a designated Contingent Annuitant, subject to the terms and conditions hereof.

The terms and provisions of this option will be determined by the Retirement Committee in accordance with the Plan.

Notwithstanding anything contained herein to the contrary, the Company reserves the right not to grant this option to any employee and the right to make it inoperative with respect to any employee to whom it has already been granted if the yearly amount of Retirement Annuity payable to his Contingent Annuitant would be less than $120.

(B) Option of Increased Retirement Annuity Payments Until Social Security Commencement Date

In lieu of the amount of Retirement Annuity otherwise payable under this Contract, such employee on being granted this option, shall be entitled to an increased amount of Retirement Annuity commencing on his Annuity Accrual Date and payable during his lifetime until the attainment of his Social Security Commencement Date with provision for the continuance of the reduced amount of Retirement Annuity thereafter during his lifetime, subject to the terms and conditions hereof.

The terms and provisions of this option will be determined by the Retirement Committee in accordance with the Plan.

Notwithstanding anything contained herein to the contrary, the Company reserves the right to modify the provisions of this option with respect to any employee to whom it has been granted, if the yearly amount of Retirement Annuity payable to him after his Social Security Commencement Date would be less than $60.

(C) Option of Life Annuity With Payments for Five Years Certain, for Ten Years Certain, for Fifteen Years Certain or for Twenty Years Certain

In lieu of the amount of Retirement Annuity otherwise payable to an employee under this Contract and in lieu of the amount of any death benefit which might otherwise be payable in accordance with Section 5 of this Article, an employee, on being granted this option, shall be entitled to an adjusted amount of Retirement Annuity commencing on the same date as the Retirement Annuity otherwise payable to him with the provision that on receipt of satisfactory proof at its Home Office that his death has occurred during the five year period, the ten year period, the fifteen year period, or the twenty year period, whichever period is elected by the employee, commencing with such date, the Company, subject to the terms and conditions hereof, will pay to the beneficiary of the employee on the first day of each month subsequent to the employee's death and prior to the fifth anniversary, the tenth anniversary, the fifteenth anniversary, or the twentieth anniversary, whichever is applicable, of the Annuity Commencement Date of the employee, an amount equal to the adjusted Retirement Annuity payment which would have been payable to the employee on the first day of each such month if he

had survived until the fifth anniversary, the tenth anniversary, the fifteenth anniversary, or the twentieth anniversary, whichever is applicable, of his Annuity Commencement Date.

The terms and provisions of this option will be determined by the Retirement Committee in accordance with the Plan.

Notwithstanding anything contained herein to the contrary,

(i) in the event the employee has designated as beneficiary his estate, or in the event the beneficiary is a corporation, association, partnership or trustee, the Company shall commute the payments which would otherwise be payable to such beneficiary, using the interest rate upon which the Considerations required to purchase or provide such annuity was based, such interest to be compounded annually, and shall pay such commuted value in one sum to the beneficiary of the employee, and

(ii) in the event there is no designated beneficiary living, the Company shall commute the payments which would otherwise be payable to the beneficiary, using the interest rate upon which the Consideration required to purchase or provide such annuity was based, such interest to be compounded annually, and shall pay such commuted value in one sum, in accordance with the second paragraph of Section 2 of Article V, and

(iii) the Company reserves the right not to grant this option to the employee and the right to make it inoperative with respect to any employee to whom it has already been granted, if the yearly amount of Retirement Annuity payable to the Employee under this option would be less than $120.

A. Notwithstanding anything contained herein to the contrary,

(a) if the Termination of employment Date of an employee occurred prior to January 1, 1968, then the provisions of this Section as in effect under Part A, Part B, Part C, Part D or Part E, whichever is applicable, prior to January 1, 1968 shall be applicable with respect to such employee.

(b) if an Optional Form of Retirement Annuity was elected by an employee prior to January 1, 1968 the terms and conditions of such Optional Form of Retirement Annuity with respect to any Retirement Annuity cancelled on January 1, 1968 shall be determined in accordance with the provisions of this Section as in effect under Part A, Part B, Part C, Part D or Part E, whichever is applicable with respect to the employee prior to January 1, 1968.

(c) on and after termination of the Fund the terms and conditions of any Optional Form of Retirement Annuity to be provided hereunder with respect to any Retirement Annuity cancelled on January 1, 1968 shall be determined in accordance with the provisions of this Section as in effect under Part A, Part B, Part C, Part D or Part E, whichever is applicable with respect to the employee, prior to January 1, 1968

SECTION 5. Death Benefit

On receipt of satisfactory proof at its Home Office that the death of an employee has occurred prior to his Annuity Commencemetn Date and provided an Optional Form of Retirement Annuity is not in effect, the Company will pay to the beneficiary of the employee in one sum an amount equal to his Employee's Accumulation, if any.

On receipt of satisfactory proof at its Home Office on and after the Annuity Commencement Date of an employee that the death of the employee has occurred or that the death of the last survivor of the employee and his Contingent Annuitant, if the Option of Continuance of Retirement Annuity to Contingent Annuitant was in effect with respect to him, the Company will pay to the beneficiary of the employee in one sum the amount, if any, by which the amount of the Employee's Accumulation which would have been payable if his death had occurred immediately before his Annuity Commencement Date exceeds the aggregate amount of the Retirement Annuity payments which have become payable hereunder to the employee or the employee and his Contingent Annuitant, if the Option of Continuance of Retirement Annuity to Contingent Annuitant was in effect with respect to him, exclusive of that portion of such Retirement Annuity payments which were attributable to any Additional Future Services Annuities, any Past Service Annuities and any Supplemental Annuity with respect to the employee which were cancelled on January 1, 1968 and any Retirement Annuity provided for the employee under the Plan on and after January 1, 1968.

On the death of an employee included under the Plan who was an employee of Univac Salt Lake City or Univac Bristol, Univac Division of Sperry Rand Corporation, the Company prior to the termination of the Fund and on the written request of the Employer, shall pay to the beneficiary of the employee in one sum the amount of death benefit payable in accordance with the Plan on account of the death of the employee, as determined by the Employer. On account of each such payment which is made by the Company in accordance with this paragraph, there shall be deducted from the Fund an amount equal to such payment, and such payment shall fully discharge any and all liability of the Company with respect to such deduction.

Unless satisfactory proof is furnished to the Company not later than five years after his Normal Retirement Date that an employee was living on such date, it shall be conclusively

presumed for the purposes of this Contract that his death occurred immediately prior to his Normal Retirement Date.

By written notice in a form satisfactory to the Company filed at its Home Office, the employee, or the beneficiary of the employee if no such election has been made by the employee during his lifetime, may elect that in lieu of payment in one sum of the amount of death benefit, provided in accordance with the first and second paragraphs of this Section payment shall be made by the Company to the beneficiary of the employee in accordance with, subject to the conditions contained therein, one of the options described in Section 5 of Article IV of Part A, Part B, Part C, Part D or Part E of this Contract, as in effect on December 31, 1967.

SECTION 6. Employee's Options on Termination of Employment

I. Provisions Applicable to an Employee with Respect to Deferred Annuities Cancelled on January 1, 1968

A. If the Termination of Employment Date of an employee occurs prior to the discontinuance of the payment of Contributions hereunder in accordance with Section 7 of Article III, then within ninety days of such Termination of Employment Date and in lieu of all benefits otherwise payable hereunder to him or on his death to his beneficiary, the employee may elect one of the following options:

(a) A cash surrender value equal to his Employee's Accumulation.

(b) A yearly amount of Normal Retirement Annuity to be provided on his Normal Retirement Date, equal to the yearly amount of Normal Retirement Annuity which could be provided

on the basis of Table I of Article VI by his Employee's Accumulation on his Normal Retirement Date, except that in no event shall such yearly amount of Normal Retirement Annuity be less than the yearly amount of Normal Retirement Annuity which would have been provided by his own contributions made prior to January 1, 1968 under the terms of the Contract as in effect on December 31, 1967; provided, however, that if the employee on or before his Termination of Employment Date has

(i) met the vesting requirements as determined under the terms of Part A, Part B, Part C, Part D or Part E of the Contract, whichever is applicable to him, as in effect on December 31, 1967, or

(ii) met the vesting requirements as determined by the Retirement Committee in accordance with the Plan, the yearly amount of Normal Retirement Annuity to be provided shall be equal to the yearly amount of Normal Retirement Annuity purchased on his account which was cancelled on January 1, 1968.

B. If the Termination of Employment Date of an employee occurs on or after the date of discontinuance of the payment of contributions hereunder in accordance with Section 7 of Article III and prior to termination of the Fund, then within ninety days of such Termination of Employment Date and in lieu of all benefits otherwise payable hereunder to him or on his death to his beneficiary, the employee may elect either one of the following options:

(a) A cash surrender value equal to his Employee's Accumulation. Such employee shall be entitled also to have a yearly amount of Normal Retirement Annuity provided for him on his Normal Retirement Date equal to the excess of (i) over (ii) below.

(i) The yearly amount of Normal Retirement Annuity purchased on his account which was cancelled on January 1, 1968.

(ii) The yearly amount of Normal Retirement Annuity which could be provided on the basis of Table 1 of Article VI by his Employee's Accumulation on his Normal Retirement Date.

(b) A yearly amount of Normal Retirement Annuity to be provided on his Normal Retirement Date, equal to the yearly amount of Normal Retirement Annuity purchased on his account which was cancelled on January 1, 1968.

C. If option (b) of either A or B of this sub-section is applicable to an employee, a death benefit shall continue to be provided on his Account, the amount of which shall be determined in the manner described in Section 5 of this Article, and a cash surrender value shall continue to be provided prior to his Normal Retirement Date or earlier Optional Retirement Date, if such has been elected, for an amount equal to his Employee's Accumulation.

If prior to discontinuance of the payments of contributions hereunder, the employee elects to receive a cash surrender value in lieu of any Retirement Annuity to be provided on his Normal Retirement Date under option (b) of sub-section A of this

Section, such election shall be in lieu of all benefits otherwise payable hereunder to him or on his death to his beneficiary.

If, on or after the date of discontinuance of the payment of contributions hereunder and prior to the termination of the Fund, the employee elects to receive a cash surrender value in lieu of any Retirement Annuity to be provided on his Normal Retirement Date under option (b) of A of this Section, such election shall be in lieu of all benefits otherwise payable hereunder to him or on his death to his beneficiary, unless on or before his Termination of Employment Date he had

(a) met the vesting requirements as determined under the terms of Part A, Part B, Part C, Part D or Part E of the Contract, whichever is applicable to him, as in effect on December 31, 1967, or

(b) met the vesting requirements as determined by the Retirement Committee in accordance with the Plan,

in which event he shall be entitled to have provided for him on his Normal Retirement Date the yearly amount of Retirement Annuity which would have been provided for him if B of this sub-section had been applicable to him on his Termination of Employment Date and he had elected option (a) thereof.

If, prior to the date of termination of the Fund, the employee elects to receive a cash surrender value in lieu of any Retirement Annuity to be provided on his Normal Retirement Date under option (b) of B of this sub-section, nevertheless he shall be entitled to have provided for him on his

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No. 92-1074

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Supreme Court, U.S.
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OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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May 20, 1993

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Question Presented

Whether the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*., apply to any of an insurance company's General Account assets under a group annuity contract that provides for guaranteed benefits.

Parties

The parties to the action below were petitioner John Hancock Mutual Life Insurance Company ("Hancock"); respondent Harris Trust and Savings Bank ("Harris Trust"); counterclaim defendant Chase Manhattan Bank, N.A. ("Chase"), which was succeeded as trustee of the Sperry Master Retirement Trust No. 2 on October 1, 1987, by Harris Trust; and third-party defendants Sperry Corporation ("Sperry") and The Retirement Committee of Sperry Corporation ("Sperry Retirement Committee").

Hancock is a mutual insurance company; it does not have any parent companies or subsidiaries to list pursuant to Rule 29.1.

In 1986, Sperry merged with Burroughs Corporation and became Unisys Corporation ("Unisys"). The Sperry Retirement Committee was succeeded by the Unisys Pension Investment Review Committee. Shares of Unisys and shares of Chase are publicly traded. Petitioner is informed and believes that Harris Trust is acting as a party only in its capacity as trustee of the Sperry Master Retirement Trust No. 2 and is not otherwise affected by the outcome of this litigation, and that the Bank of Montreal is a parent of Harris Trust.

Hancock is not aware of any other parent companies or subsidiaries to list pursuant to Rule 29.1.

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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Petitioner John Hancock Mutual Life Insurance Company ("Hancock") respectfully submits this brief in support of reversal of so much of the judgment of the United States Court of Appeals for the Second Circuit as (a) determined that the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*. ("ERISA"), apply to certain of Hancock's General Account assets in connection with a group annuity contract issued to respondent Harris Trust and Savings Bank ("Harris Trust") known as "GAC 50" (JA-109[1])

[1] References to pages of the Joint Appendix, the Appendix included in the Petition for a Writ of Certiorari, and the Appendix to this brief are cited as "JA-", "PA-", and "A-", respectively, followed by the page number.

and (b) reversed the judgment of the United States District Court for the Southern District of New York dismissing the action.

Opinions Below

The opinion of the court of appeals is reported at 970 F.2d 1138 (PA-1). The two opinions of the district court are reported at 722 F. Supp. 998 ("*Harris I*") (PA-21), and 767 F. Supp. 1269 ("*Harris II*") (PA-63); the judgment of the district court was entered on August 16, 1991 (PA-89).

Jurisdiction

The judgment of the court of appeals was entered on July 30, 1992 (PA-19). The court of appeals denied Hancock's petition for rehearing and suggestion for rehearing *in banc* on September 23, 1992 (PA-91). The petition for a writ of certiorari was filed on December 22, 1992, and was granted on March 22, 1993.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988 & Supp. 1991).[3]

Statutes and Regulations Involved

The pertinent statutory provisions and regulations are set forth in the Appendix to the Petition beginning at PA-93.

[2] On January 21, 1993, Harris Trust filed a cross-petition for a writ of certiorari (No. 92-1259). The questions presented by Harris Trust in No. 92-1259 were (i) whether an insurance company should be deemed a fiduciary under ERISA by reason of its exercise of its contract rights under a group annuity contract with a pension plan, and (ii) whether all the assets held by an insurance company in its General Account under a typical group annuity contract like GAC 50, not just the portion of such assets that are "not referable to guaranteed benefits," are subject to ERISA's fiduciary rules. By order entered on March 22, 1993, the Court denied Harris Trust's cross-petition.

[3] The amended complaint alleged jurisdiction in the district court based upon 28 U.S.C. §§ 1331 and 1332 (1988 & Supp. 1991), and ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. 1991) (JA-50). Jurisdiction was alleged in the original complaint solely on the basis of 28 U.S.C. § 1332 (JA-32).

Statement of the Case

This case arises out of a dispute involving a group annuity contract, GAC 50, issued by Hancock to a pension plan for the benefit of employees of the Sperry Corporation.[4] The Second Circuit held that an unspecified portion of Hancock's General Account assets — those that the court described as "not referable to guaranteed benefits" payable under GAC 50 (PA-14) — are assets of the Sperry Plan and subject, therefore, to the fiduciary provisions of ERISA. In doing so, the Second Circuit rejected Hancock's contention that under ERISA's "guaranteed benefit policy" provision, ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2) (1988) (PA-94), none of Hancock's General Account assets are assets of the Sperry Plan.

The judgment below should be reversed, because the Second Circuit's construction of the "guaranteed benefit policy" provision is at odds with the plain meaning of that section and with ERISA as a whole. That court's interpretation of section 401(b)(2) is also contrary to the statute's object and policy, its legislative history and the consistent and long-standing interpretation of the statute by the Department of Labor (the "DOL"), the agency charged by Congress with implementing and enforcing ERISA.

The Second Circuit's construction of ERISA, if correct, would create an irreconcilable conflict between federal and state law. The management and administration of an insurer's General

[4] Although the original contractholder of GAC 50 was The Sperry Corporation (together with various affiliated companies), that entity has undergone numerous changes in name and corporate form since 1941. For convenience, however, that entity will be referred to throughout this brief as "Sperry," and the employee benefit plan sponsored by that entity will be referred to as the "Sperry Plan." By an amendment to the contract effective May 1, 1978, the rights of the contractholder were transferred from Sperry to Chase Manhattan Bank, N.A., as Trustee of The Sperry Rand Master Retirement Trust No. 2 ("Chase"). Chase, acting in its capacity as trustee of the Sperry Plan, was originally the named plaintiff in this lawsuit. As of October 1, 1987, Chase was replaced as trustee by Harris Trust, and Harris Trust has been substituted as plaintiff. Chase and Harris Trust in their capacities as trustee are referred to herein as "Harris Trust."

Account, which consists of all its general corporate assets, have historically been subject solely to state regulation, in accordance with the basic federal policy set forth in the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1988 & Supp. 1991) (PA-93), that the regulation of the business of insurance be left to the States. State law requires that insurers deal fairly and equitably and in a nondiscriminatory manner with all policyholders, including pension plan policyholders. ERISA, on the other hand, requires that a fiduciary discharge his duties with regard to a pension plan solely in the interest of, and for the exclusive purpose of providing benefits to, a plan's participants. ERISA § 404(a), 29 U.S.C. § 1104(a) (1988 & Supp. 1991) (PA-94). If the Second Circuit's ruling is upheld, the General Account operations of insurers will be subject to federal fiduciary rules that are in direct conflict with their obligations under state insurance law.

1. *ERISA's Fiduciary Provisions.*

ERISA contains a complex set of rules governing the conduct of a fiduciary, including the obligation that a fiduciary

> discharge his duties with respect to a plan solely in the interest of the [plan's] participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.

ERISA § 404(a) (PA-94). Under ERISA, a fiduciary is any person who "exercises any authority or control respecting management or disposition" of a pension plan's assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988) (PA-93). An insurance company, like other persons, is not a fiduciary under ERISA unless the insurer has authority or control over the plan's assets.

Congress did not provide a comprehensive definition of the term "plan assets" in ERISA. In section 401(b)(2), ERISA's "guaranteed benefit policy" provision, however, Congress expressly declared that an insurer's assets held under a "policy or contract that provides for benefits the amount of which is guaranteed by the insurer" are not plan assets:

> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. . . .
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> * * *
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> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 401(b)(2) (PA-94). Under that provision, when an insurer has issued a contract that in its entirety provides for guaranteed benefits, only the contract is an asset of the plan, and the insurer's assets supporting its obligations under the contract are not plan assets.

In this case, the Second Circuit, rejecting the reasoning of the Third Circuit in *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), construed the "guaranteed benefit policy" provision so as to apply the fiduciary rules to some but not all of an insurer's General Account assets. The Second Circuit acknowledged that GAC 50, a conventional type of group annuity contract issued by insurers to pension plans, is a policy or contract that provides for guaranteed benefits and that, in part at least, GAC 50 comes within the "guaranteed benefit policy" provision (PA-8). The court concluded, however, that the provision does not apply "to the extent that" any of Hancock's General Account assets are "not referable to guaranteed benefits" (PA-10, PA-14). With respect to those assets, the court held, Hancock is subject to ERISA's fiduciary rules (PA-10).

2. *The General Account.*

The General Account of an insurance company consists of all its general corporate assets, including, but not limited to, its office property, equipment and investments (JA-93, JA-178).

The insurance company combines in its General Account premiums received from all its lines of business, and all its General Account assets are available to satisfy all of the company's obligations to its policyholders, including all individual and group life, health, disability and annuity policyholders, as well as other creditors.[5] The General Account is also the insurance company's business operating account: General Account funds comprise all of the funds (and the only funds) available to the company for the conduct of its routine business activities, such as the payment of salaries, rent, taxes and other ordinary business expenses.[6]

Integral to the insurance relationship embodied in General Account contracts are the transfer of risk from the policyholder to the insurer, upon payment of the required premium, and the spreading of that risk among a vast number of insurance customers.[7] The premiums paid by those customers are pooled by the insurer and are invested on a commingled basis to achieve the greatest possible return, consistent with investment safety and the requirements of applicable state insurance laws and regulations.[8] The aggregate of all these invested premiums then stands behind all the insurer's obligations, with the exception of obligations supported by any Separate Account assets.[9]

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[5] Robert I. Mehr, *Fundamentals of Insurance* 9 (2d ed. 1986); Kenneth L. Walker, *Guaranteed Investment Contracts: Risk Analysis and Portfolio Strategies* 21 (1989).

[6] Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 492 (6th ed. 1989).

[7] *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); David J. Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 68-69 (1976).

[8] Mehr, *supra*, at 9; Walker, *supra*, at 21; McGill & Grubbs, *supra*, at 492-93.

[9] An insurance company Separate Account is a segregated fund established pursuant to contract with one or more customers, including, typically, employee benefit plans. *See* ERISA § 3(17), 29 U.S.C. § 1002(17) (1988). Under Separate Account arrangements, assets held are invested separately, and the results of the investments are passed through to the customer directly, frequently in the form of variable annuity benefits. *See infra* notes 27-28.

Through the pooling of premiums in the General Account, pension plans and other purchasers of insurance contracts are able to transfer and share risk among themselves in exchange for the insurer's contractual guarantees. Because all of the insurer's General Account assets are available to satisfy all of its obligations, the insurer is able to underwrite policies that guarantee a result acceptable to all policyholders, with no one policyholder suffering the adverse results that would surely confront some of them if all were to stand alone.[10]

Consistent with the concepts of pooled assets and shared risk, there are no specific assets identifiable with or referable to any particular General Account policy, to any portion of any policy, or to any specific benefits provided under a policy.[11] Instead, policyholders have contractual rights *vis-à-vis* the insurer that are supported by all of the insurer's General Account assets.[12] Premiums deposited in the General Account become the property of the insurance company.[13] The commingled funds in the General Account are invested and reinvested by insurers on an undifferentiated basis in various types of assets.[14] Since none of an insurer's assets is, or is capable of being, segregated, identified with or attributable to any particular contract or obligation, an insurer's General Account assets cannot be separately managed "solely in the interest of" or "for the exclusive benefit of" any particular policyholder.

3. *The Contract at Issue.*

GAC 50 is a common type of General Account group annuity contract issued to pension plans. In consideration of

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[10] Kenneth Black, Jr., & Harold D. Skipper, Jr., *Life Insurance* 14, 310-11 (11th ed. 1988).

[11] Walker, *supra*, at 21; McGill & Grubbs, *supra*, at 492.

[12] Black & Skipper, *supra*, at 119, 132-37; McGill & Grubbs, *supra*, at 492.

[13] McGill & Grubbs, *supra*, at 492.

[14] Mehr, *supra*, at 9; Walker, *supra*, at 21.

premiums paid by the plan, which become part of the insurer's General Account, the insurance company unconditionally guarantees to the contractholder that the insurer will pay pension benefits to participants specified by the plan, in fixed amounts determined by the plan (JA-120 to JA-123, JA-135 to JA-139).[15] The insurer's contractual commitment is backed by all of its General Account assets.

Contracts like GAC 50 are "participating" contracts (JA-85). Such contracts share, or "participate," in the positive investment experience of the insurance company's General Account through an allocation of net investment income or dividends (JA-85 to JA-88).[16] The book value of the premiums paid to the insurer, combined with any income or dividends allocated to the contract, less the amount of any benefits previously paid, may exceed the contractual cost of the benefits guaranteed under the contract (determined on the basis of the contract's annuity purchase rates) that the insurer has been instructed to provide.[17] Under such a contract, the contractholder has the option to require the insurer to use the full amount of the book value excess to provide additional guaranteed benefits to plan

[15] Typically, pension plan participants are entitled to receive fixed monthly benefit payments from the plan, which may be paid directly by the plan. McGill & Grubbs, *supra*, at 27-28. If a pension plan enters into a group annuity contract with an insurance company, however, the insurer, in consideration of the premiums received, will contractually guarantee the monthly benefit specified by the plan and pay such benefits to the designated plan participants. Mehr, *supra*, at 465; Black & Skipper, *supra*, 494-98.

[16] McGill & Grubbs, *supra*, at 493; Mehr, *supra*, at 455-56; Black & Skipper, *supra*, at 496-97. The contract's participation in the insurer's experience, whether positive or negative, has no effect on the insurance company's guarantee of benefit payments to plan participants. Once those guarantees are made, they are not affected by the contract's experience, and payment of the contractually guaranteed benefits is backed by the entire General Account, without regard to the insurer's mortality, expense or investment experience. *See* Black & Skipper, *supra*, at 497.

[17] McGill & Grubbs, *supra*, at 493; Mehr, *supra*, at 455-56; Black & Skipper, *supra*, at 496-97.

participants, and the insurer is contractually obligated to do so.[18]

GAC 50 expressly requires that the assets held by Hancock under the contract be part of the General Account (except to the extent that Harris Trust has directed that assets be transferred to a Separate Account)[19] (JA-117) and that all monies paid to Hancock become part of its "general corporate funds" (JA-178 to JA-179). The contract further states that it is a participating contract and that Hancock shall allocate to the contract each year the contract's share of the net interest and capital gains and losses of the company, in accordance with regular procedures determined by the company for contracts of the same class (JA-92).[20] GAC 50 guarantees the payment of benefits to plan participants, which are not affected or terminated even

[18] Mehr, *supra*, at 455. The contractholder may have other options as well. *See McGill & Grubbs*, *supra*, at 497. For example, the contractholder may have the right to transfer the book value excess from the General Account to a Separate Account, subject to a "market value adjustment" that adjusts the book value of the transferred assets to their current market value. Second, the contractholder might have the right to transfer the book value excess, again subject to a "market value adjustment," to another insurance company, to another investment medium, such as a bank trust account, or to the plan itself. Finally, the contractholder might have the right to require the insurer to apply the excess for the payment to plan participants of fixed monthly benefits payable under the plan that are not guaranteed by the insurer. GAC 50 provided each of these options (JA-140 to JA-144, JA-230 to JA-231, JA-247 to JA-248).

[19] From time to time, Harris Trust caused funds to be transferred from Hancock's General Account to the Separate Account established under GAC 50. Hancock's status under ERISA with respect to any assets transferred to the Separate Account under GAC 50 is not at issue in this case.

[20] From its inception in 1941 until December 31, 1967, GAC 50 was a dividend-rated participating Deferred Annuity contract (JA-84, JA-86). By an amendment effective as of January 1, 1968, the contract was converted to a direct-rated Retrospective Immediate Participation Guarantee ("Retro-IPC") form of contract (JA-87) and was thereafter a partially direct-rated and partially dividend-rated participating contract (JA-86 to JA-87). The preexisting guarantees of benefits to plan participants were not affected by the conversion (JA-89). After the conversion in 1968, Hancock provided additional guaranteed benefits in accordance with the contract (PA-67). Although GAC 50 was amended on a number of other occasions, Hancock's guarantees to plan participants under the contract, for both pre-1968 and post-1968 benefits, have not changed in any way

if (i) there is a subsequent breach of the contract by Harris Trust or (ii) the premiums paid by Harris Trust, together with the investment income allocated to the contract, are insufficient to provide the pension benefits Hancock had obligated itself to pay (JA-89 to JA-91, JA-135 to JA-139; PA-65).[21] Finally, Harris Trust, as contractholder, could at any time, if it elected to do so, require Hancock to use the contract's book value in excess of the contractual cost of the existing guaranteed benefits (the so-called "free funds") to provide additional guaranteed benefits on the basis of the annuity purchase rates fixed in the contract (JA-90).

4. *State Regulation of Insurance.*

An insurance company's administration of its General Account and its obligations to its policyholders are governed by state insurance laws and regulations as well as contract provisions. Under state law, General Account assets are available to satisfy an insurer's obligations to all its policyholders and creditors. To assure that those assets are invested prudently and that insurers deal evenhandedly with all classes of policyholders, each of the States, in accordance with the national policy underlying the McCarran-Ferguson Act (PA-93), has developed a comprehensive framework of insurance company regulation.[22]

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[21] Under GAC 50 in its Retro-IPG form, the book value of the contract is called the Pension Administration Fund, or "PAF," and the contractual cost of the guaranteed benefits as they exist at any time is called the Liability of the Fund, or "LOF." The contract requires the contractholder to maintain the PAF in an amount at least equal to the LOF (and, in certain circumstances, in an amount at least equal to 105% of the LOF, *i.e.*, the contract's Minimum Operating Level, or "MOL"). In the event that the amount of the PAF becomes less than the LOF, the contractholder is obligated to contribute additional funds to Hancock's General Account to increase the account balance of the PAF to the required level (JA-89 to JA-90). If the contractholder failed to do so, certain events could cause the contract to revert to a Deferred Annuity form of contract (JA-89 to JA-90). The benefits that have been guaranteed to plan participants under the contract are not affected by any of these events (JA-90 to JA-91).

[22] Black & Skipper, *supra*, at 119, 572-83; Robert E. Keeton, *Basic Text on Insurance Law* 554-57 (1971); 2A George J. Couch, *Couch on Insurance* §§ 21:23 to 21:33, 21:35 to 21:37, 21:40 to 21:41, 22:10, 22:32, 22:34 (2d ed. 1984). For example, the form and content of insurance contracts, including group

(Footnote continued)

An insurance company's General Account operations have historically been subject to a substantial body of state laws and regulations.[23] For example, there are laws that limit the types of investments that can be made with General Account assets and require the diversification of investments and the maintenance of reserves. *E.g.*, N.Y. Ins. Law §§ 1402, 1403, 1409 (McKinney 1985); Mass. Gen. Laws ch. 175, § 66B (West 1987 & Supp. 1993) (authorizing the use of General Account assets to invest in home office properties). Similarly, an insurer's allocation of income and expenses within its General Account is specifically regulated by state insurance departments, which, in Hancock's case, have endorsed its "investment year method" for distributing net investment income. *See* N.Y. Comp. Codes R. & Regs. tit. 11, § 91.1 *et seq.* (1993). Furthermore, both the determination of the amount of divisible surplus available to be paid to an insurance company's policyholders and the payment of dividends have traditionally been matters subject to exclusive state regulation. *See, e.g.*, Mass. Gen. Laws ch. 175, § 93E (West 1987); N.Y. Ins. Law § 4231 (McKinney 1985 & Supp. 1993).[24]

ERISA's fiduciary provisions, if applied to a General Account contract, would be irreconcilably in conflict with state law. In contrast to the ERISA standard, which requires that a fiduciary act "solely in the interest of" a particular plan and its participants, state insurance laws and regulations require that General Account assets be administered to spread risk fairly and equitably among

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annuity contracts, are typically subject to the review and approval of the state insurance departments where they are issued. *See, e.g.*, N.Y. Ins. Law § 3201(b)(1) (McKinney 1985 & Supp. 1993). GAC 50 and each of its amendments, as required by New York law, were submitted to and approved by the New York State Insurance Department (JA-110, JA-216, JA-217, JA-219, JA-222, JA-224, JA-240, JA-250, JA-263).

[23] *See* Brief of the State of New York as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari (Jan. 21, 1993) ("NYS Brief") at 11-12; Brummond, *supra*, at 81-83.

[24] In this case, despite the fact that they are subject to state regulatory supervision, Harris Trust challenged under ERISA's fiduciary rules a broad range

(Footnote continued)

all life, health, employee benefit and other contractholders whose contract rights are supported by such assets. As the Third Circuit recently noted:

> These state-imposed duties do not mesh easily with ERISA's requirement that plan assets be managed "solely in the interest" of plan customers. Whenever an insurance company acts "solely in the interest" of a pension plan customer, it would violate state law. Whenever an insurance company takes actions to ensure that under state law, it is treating its policyholders fairly and equitably, it runs the risk of violating ERISA's fiduciary requirements.

Mack Boring, 930 F.2d at 275 n.17. If ERISA's fiduciary rules are made applicable to General Account operations, fundamental insurance company policies and practices that are sanctioned, if not mandated, by state law would be open to challenge.[25]

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of Hancock's General Account acts and practices, including its investment decisions, its method of allocating investment income among its lines of business, and its determinations regarding dividends (PA-6 to PA-7). Indeed, Harris Trust argued in the lower courts that, if ERISA's fiduciary provisions applied, a number of Hancock's routine business practices would be *per se* unlawful and that Hancock should be held liable for ERISA penalties as well as money damages. For example, Harris Trust challenged Hancock's investment in its home office building as a *per se* violation of ERISA § 406, 29 U.S.C. § 1106 (1988), even though such an investment is permitted under state law (PA-31 to PA-32).

[25] In its original complaint in this case, Harris Trust alleged some 13 causes of action, which sounded generally in common law breach of contract and common law breach of fiduciary duty, relating to Hancock's administration of GAC 50 (JA-39 to JA-46). No mention was made of ERISA (JA-32). Almost one year later, Harris Trust amended its complaint to allege, as its first cause of action, that all of Hancock's conduct previously alleged to have violated Harris Trust's rights at common law also violated ERISA (JA-50). In *Harris I*, the district court granted summary judgment dismissing all of Harris Trust's ERISA claims (PA-62). In *Harris II*, that court granted summary judgment dismissing all of Harris Trust's common law claims (PA-87). Harris Trust now contends, in effect, that Hancock should be held liable under ERISA with regard to its General Account activities, despite the fact that all of Harris Trust's state law claims relating to those activities have been dismissed on the merits.

Summary of Argument

The provisions of ERISA, read as a whole, plainly show that the statute's fiduciary rules do not apply to an insurance company's General Account assets in connection with contracts like GAC 50. The "guaranteed benefit policy" provision makes clear that insurance contracts, not the insurer's assets, are plan assets. That provision distinguishes between assets held in Separate Accounts, which support the payment of variable annuity benefits, and General Account assets, which support the payment of fixed guaranteed benefits. Because (i) all the assets supporting GAC 50 are General Account assets and (ii) Hancock is contractually obligated, at the contractholder's direction, to provide fixed guaranteed benefits to the full extent of those assets, GAC 50 in its entirety is a "guaranteed benefit policy," and none of Hancock's General Account assets constitute plan assets.

Hancock's construction of the "guaranteed benefit policy" provision is in harmony with all the other provisions of ERISA. Its interpretation construes the word "benefits" in section 401(b)(2)(B) as referring to a benefit payment to a plan participant or beneficiary, the same sense in which that word is used in the more than 30 other instances in which it appears in ERISA. It is also consistent with the statute's treatment of investment company securities and assets, which closely parallels the treatment of insurance company policies and assets. Lastly, that construction is consistent with ERISA's complementary provisions dealing with Separate Accounts and Separate Account assets.

In contrast, the Second Circuit's construction, which focuses narrowly and exclusively on the "to the extent that" phrase in section 401(b)(2)(B), ignores the remainder of that section, as well as the other relevant provisions of ERISA, and renders the statute internally inconsistent. That court's ruling also subjects the management and administration of an insurer's General Account to federal regulation under ERISA, in direct contravention of the McCarran-Ferguson Act and ERISA's preemption saving clause, ERISA § 514(b), 29 U.S.C. § 1144(b) (1988 & Supp. 1991) (PA-95). In the saving clause, Congress expressly reaffirmed

the long-standing federal policy, set forth in McCarran-Ferguson, of leaving the regulation of the business of insurance to the States.

The Second Circuit's construction lacks any support whatever in ERISA's legislative history. Nowhere in the statute itself or in its vast legislative history is there any evidence of a congressional intent to work the radical restructuring of federal and state responsibilities that would necessarily result from the treatment of General Account assets as plan assets.[26] Congress understood that the business of insurance is subject to an elaborate system of state regulation designed to protect the solvency of insurers and assure the payment of benefits to all policyholders. There is not one sentence in ERISA's extensive legislative history that supports an interpretation of ERISA that would displace that comprehensive system of regulation or superimpose federal requirements on the existing state regulatory regime. As the Third Circuit noted in *Mack Boring*:

> [I]f Congress had intended so severe a disruption of insurance practices, practices that had been in existence for almost three decades before the enactment of ERISA, it would have made its intention perfectly clear. . . . There is no such clear indication in the legislative history of the guaranteed benefit policy exception. Indeed, the legislative history . . . points in the opposite direction.

930 F.2d at 275 n.17 (citations omitted).

Finally, since ERISA's enactment in 1974, the DOL has consistently stated that General Account assets do not constitute plan assets for purposes of ERISA's fiduciary rules. In keeping with its interpretation of the statute, the DOL, over a period of more than 18 years, has never once stated that ERISA's

[26] Hancock has submitted with its Brief an appendix ("Appendix") containing a comprehensive index to the legislative history of ERISA, a list of the persons and organizations who submitted oral and written statements to Congress, and an identification of all other collateral written material submitted to Congress.

fiduciary provisions are applicable to the General Account practices of insurance companies and has never once sought to invoke those provisions with regard to those practices. In light of the statute's clear language and purpose, its unequivocal legislative history and the clash that would inevitably arise between ERISA's fiduciary provisions and state insurance regulation, any other interpretation of the statute is insupportable.

Argument

WITH RESPECT TO GAC 50, NONE OF HANCOCK'S GENERAL ACCOUNT ASSETS ARE "PLAN ASSETS" UNDER ERISA

In construing ERISA's fiduciary provisions, this Court should look to both the language of the "guaranteed benefit policy" provision and the statute as a whole. As the Court noted in *Massachusetts v. Morash*, 490 U.S. 107 (1989),

> in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Id. at 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). The Second Circuit gave no heed to that governing principle of statutory construction, electing instead to rely upon its reading of a single phrase within one subparagraph of one subsection of the statute. In doing so, it reached a result contrary to the language and purpose of the "guaranteed benefit policy" provision, other provisions of the statute, the object and policy of both ERISA and the McCarran-Ferguson Act, ERISA's legislative history, and the DOL's long-standing interpretation of the statute.

A. *ERISA's Language and Purpose Make Clear That, Under Contracts Like GAC 50, General Account Assets Are Not Plan Assets.*

Congress enacted ERISA in 1974 for the purpose of curbing abuses in the private pension industry by imposing regulatory control over previously unregulated activities. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 549, 570 (1979)

("Congress believed that it was filling a regulatory void when it enacted ERISA."). In recognition of the fact that pension plans were not subject to adequate safeguards, ERISA "sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits." *Massachusetts v. Morash*, 490 U.S. at 113.

To fill the perceived regulatory void, Congress created a federal fiduciary standard of conduct applicable to plan administrators and other persons having authority or control over a pension plan or the "management or disposition of its assets." ERISA § 3(21)(A) (PA-93). Although the statute does not fully delineate the circumstances under which assets in the possession of a third party will be considered "plan assets," section 401(b) clarifies the statute's application in two contexts — investment company securities and insurance company policies. That section provides:

> (1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq.*], the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company.
>
> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
>
> (A) The term "insurer" means an insurance company, insurance service or insurance organization, qualified to do business in a State.
>
> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 401(b). Under those provisions, a plan's assets consist of the investment security or the insurance policy alone, not the underlying assets of the investment or insurance company. Accordingly, monies paid by the plan to an investment company or an insurance company lose their identity as the plan's assets once they are received and become part of the recipient's general corporate assets. Thereafter, the plan's assets are its rights under the security or policy issued to the plan, as the case may be. In neither situation are the recipient company's underlying assets deemed to be "plan assets."

The language of section 401(b)(2) defines a "guaranteed benefit policy" in terms of two fundamental distinctions. First, the section distinguishes contracts written on Separate Accounts from those written on the General Account. Second, the provision distinguishes "guaranteed" benefits, which are annuities payable in fixed amounts to plan participants from the insurer's General Account, from other benefits, in particular, variable annuity benefits, which by state law can only be issued on insurance company Separate Accounts. In contrast to the Third Circuit in *Mack Boring*, the Second Circuit misunderstood and misapplied section 401(b)(2), because it failed to recognize those distinctions.

The Second Circuit also misconstrued the use in section 401(b)(2) of the word "benefits," which is repeatedly used elsewhere in the statute to refer to payments to plan participants. Its misinterpretation of that key word caused it to misread the section by focusing on fixed versus variable rates of return to the plan sponsor, about which the statute says nothing. Finally, the court misconstrued the "to the extent that" and "provides for" language by attempting to bifurcate the contract, even though, under GAC 50, Hancock is obligated to the full extent of the book value of the contract to provide guaranteed benefits at the direction of the contractholder.

1. *Section 401(b)(2) Distinguishes Separate Account Contracts From General Account Contracts.*

Section 401(b)(2)(B) draws a fundamental distinction between policies that provide for fixed benefits guaranteed with all of the

insurer's General Account assets and policies that provide for variable annuity benefits supported by segregated assets held in a Separate Account.[27] The section explicitly states that assets in a Separate Account (apart from the insurer's own funds, or "surplus") do not come within the definition of "guaranteed benefit policy" and may therefore be plan assets subject to the fiduciary provisions.[28] In contrast, insurance company assets not maintained in a Separate Account, *i.e.*, General Account assets, are not plan assets if they are held in connection with a "guaranteed benefit policy." The distinction drawn by Congress in section 401(b)(2)(B) between Separate Account and General Account assets reflects the fundamental differences between such accounts, their different regulatory status under state law, and Congress' separate and distinct treatment of Separate Accounts elsewhere in ERISA.

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[27] Insurance company Separate Accounts are defined in ERISA § 3(17), which provides:

> The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

Provisions specifically related to such accounts are set forth elsewhere in the statute. *See, e.g.*, ERISA §§ 103(a)(2), 408(b)(8), 29 U.S.C. §§ 1023(a)(2), 1108(b)(8) (1988).

[28] The legislative history of ERISA reflects Congress' intent to apply the statute's fiduciary rules in the context of Separate Account assets:

> Additionally, it is understood that assets placed in a separate account managed by an insurance company are separately managed and the insurance company's payments generally are based on the investment performance of these particular assets. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets (but need not be held in trust).

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 296 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5037, 5077, *and in* III Legislative History of ERISA, at 4563 (1976) ("Conference Report").

Under Separate Account contracts, funds held by the insurer are invested separately, the results of investments are passed through to the policyholder directly (frequently in the form of variable annuity benefits), and the insurance company does not provide a guarantee of the benefits payable to plan participants.[29] McGill & Grubbs, *supra*, at 495; Black & Skipper, *supra*, at 497, 537, 557. Under state law, variable annuities, which provide participants with benefits that vary in amount with investment performance, can be issued only from Separate Accounts, not out of an insurer's General Account.[30] Furthermore, the investments made by an insurance company with Separate Account

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[29] The distinction between fixed and variable annuity benefits is well recognized. As this Court explained in *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959):

> While all the States regulate "annuities" under their "insurance" laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy.

Id. at 69.

[30] The insurance laws of all 50 States require that variable annuities be issued from Separate Accounts. *See, e.g.*, D.C. Code Ann. § 35-639 (1981); Mass. Gen. Laws Ann. ch. 175, §§ 132F-132H (1987); N.H. Rev. Stat. Ann. §§ 408:30-408:31 (1991); N.J. Stat. Ann. § 17B:28-1 (1985); N.Y. Ins. Law § 4240 (1985 & Supp. 1993); Ariz. Comp. Admin. R. & Regs. § 4-14-707(D)(4) (1992); Cal. Code Regs. tit. 10, § 2528 (1993); Conn. Agencies Regs. § 38-154a-6 (1985); D.C. Mun. Regs. tit. 26, § 1004.12 (1990); Ill. Admin. Code tit. 50, § 1451.40 (1992); Code Me. R. 310, art. VIII (1984); Mo. Code Regs. tit. 20, § 400-1.020 (1991); N.Y. Comp. Codes R. & Regs. tit. 11, § 50.1 (1993); N.D. Admin. Code §§ 45-04-02-02, 40-04-02-04 (1992); S.D. Admin. R. 20:06:07:03 (1993); Tex. Admin. Code tit. 28, §§ 3.702-.704 (1988); Wis. Admin. Code § Ins. 2.13 (Apr. 1992); Wyo. Admin. Code ch. 16.1, § 5 (1992). *See* DOL Advisory Opinion 78-8A (Mar. 13, 1978) (distinguishing between General Account and Separate Account contracts and stating that state insurance laws "prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset account").

assets are not subject to the same elaborate regulation under state law as are General Account investments,[31] and variable annuities are not considered to be within the "business of insurance" under McCarran-Ferguson. *Variable Annuity Life Ins. Co.*, 359 U.S. at 71.

In contrast, General Account assets are the property of the insurer and support the insurer's guarantees under all its General Account contracts, as well as its obligations to all its other creditors. McGill & Grubbs, *supra*, at 492. Only fixed benefits, like those payable under GAC 50, may be paid from an insurer's General Account assets.[32] An insurer's General Account assets and operations are subject to comprehensive state regulation in accordance with McCarran-Ferguson. The "guaranteed benefit policy" provision quite reasonably recognizes that, so long as an insurer has guaranteed the benefits payable to plan

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[31] As described in Black & Skipper, a leading text on insurance company products for pension plans:

> The variable annuity contract provides benefits that vary directly with the investment experience of the assets that back the contract. Assets backing variable annuities, like those backing variable life policies, are maintained in a separate account and the investment results of this account are reflected directly in the variable annuity values. In contrast, the assets backing the products discussed earlier are those of the life insurer's general account.
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> *The general account of an insurance company is restricted by state laws to the type and quality of investments it may hold.* Since these investments support liabilities for products with interest guarantees, they must offer safety of principal and a predictable income stream. *Separate accounts have few, if any, investment restrictions.* Income, gains, and losses on separate account assets are credited to or charged against the separate account. Income, gains, and losses on the rest of the company's business are kept apart from the separate account. Funds of variable annuity contract owners are held in the separate account, and the contract owners participate fully in the investment results.

Id. Black & Skipper, *supra*, at 107 (emphases added).

[32] *E.g.*, *Spellacy v. American Life Ins. Ass'n*, 131 A.2d 834 (Conn. 1957) (under state law, only policies for the payment of fixed benefits may be issued from insurers' General Accounts). *See generally Variable Annuity Life Ins. Co.*, 359 U.S. at 69-70 (discussing history of fixed and variable annuities).

participants with the entirety of its General Account assets, federal regulation under ERISA is unnecessary.[33] The statute provides, therefore, that General Account assets under contracts like GAC 50 are not plan assets and are not subject, therefore, to the statute's fiduciary rules.[34] The Second Circuit misconstrued section 401(b)(2), because it failed to give effect to the fundamental distinction between General Account and Separate Account contracts.[35]

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[33] *See* DOL Proposed Regulations Relating to Definition of Plan Assets, 44 Fed. Reg. 50,363, 50,364 (1979) (to be codified at 29 C.F.R. pt. 2550) (proposed Aug. 28, 1979) (Section 401(b)(2)'s "exemption for contracts or policies issued by insurers and funded by insurers' general accounts also appears to be based upon the fact that the plan benefits provided under such contracts or policies are insured by an entity which is subject to state regulation designed to assure the entity's ability to pay benefits specified in the policy when due. Obviously, such protections are not available with respect to some other types of pooled investments."); McGill & Grubbs, *supra*, at 439 (General Account assets are exempted from ERISA's fiduciary responsibility provisions, because "the general account operations, including its investment activities, are adequately supervised by state regulatory authority."). A similar rationale applied to the exemption for investment companies. *See* Conference Report, *supra*, at 5077 ("Since mutual funds are regulated by the Investment Company Act of 1940 and, since (under the Internal Revenue Code) mutual funds must be broadly held, it is not considered necessary to apply the fiduciary rules to mutual funds merely because plans invest in their shares.").

[34] The second sentence of section 401(b)(2)(B) includes "surplus" in a Separate Account within the definition of "guaranteed benefit policy." The Conference Report explained that Separate Account surplus is created when "insurance companies place some of their own funds [*i.e.*, General Account funds] in . . . separate accounts to provide for contingencies. . . ." Conference Report, *supra*, at 5077. Thus, Congress exempted General Account assets from ERISA's fiduciary provisions if such assets were transferred to a Separate Account. It would be illogical in the extreme if Congress, having excluded General Account assets transferred to a Separate Account, did not intend the same result with respect to General Account funds that remained in the General Account. *Cf. Mack Boring*, 930 F.2d at 272.

[35] The Second Circuit's decision is also flawed, because it accords Separate Account and General Account contracts the same treatment if they contain a guaranteed rate of return to the plan sponsor. The Second Circuit relied upon two DOL Advisory Opinions, Nos. 78-8A and 83-51A, misconstruing

(Footnote continued)

2. *Section 401(b)(2) Draws a Distinction Between Contracts Providing Fixed and Variable Benefits to Participants Rather Than Between Contracts Providing Fixed and Variable Rates of Return to Plan Sponsors.*

A "guaranteed benefit policy" is defined as an insurance contract providing for "benefits the amount of which is guaranteed by the insurer." ERISA § 401(b)(2)(B). The definition turns

them as stating that a General Account contract comes within the meaning of "guaranteed benefit policy" if it provides for a fixed rate of return, whether or not it also provides for fixed guaranteed benefits. In these Advisory Opinions, however, the DOL was addressing whether Separate Account contracts were subject to ERISA's fiduciary provisions.

In Opinion No. 78-8A, the DOL, relying upon the Conference Report, concluded that a particular insurer's basic asset account should be considered a Separate Account, even though denominated a "general account," because

> *the annuity payments to which a participant or beneficiary will be entitled are dependent upon the investment performance of the assets held by CREF.* The CREF account thus constitutes a *separate account* as defined by [ERISA] and the assets therein are plan assets pursuant to section 401(b)(2).

DOL Advisory Opinion No. 78-8A, at 5 (Mar. 13, 1978) (emphases added) (A-107). In Opinion No. 83-51A, the DOL determined that, since the Separate Account contracts involved

> provide for fixed obligations of the insurance company and . . . *the investment performance of the separate accounts . . . [does] not, in any circumstances, affect the insurance company's obligations* to either the plan to which the contract is issued or to its participants and beneficiaries, such separate accounts would therefore not be considered to hold "plan assets."

DOL Advisory Opinion No. 83-51A, at 2-3 (Sept. 21, 1983) (emphasis added) (A-112). The requirement stated in Opinion No. 83-51A that return must be guaranteed in order for assets to escape treatment as plan assets applies only to assets in a Separate Account, in recognition of the fact that the second sentence of section 401(b) applies specifically to that type of contract. No such requirement has ever been articulated by the DOL or Congress with respect to General Account assets. *See* 29 C.F.R. § 2510.3-101(h)(1)(iii) (1991) (Separate Account assets are not plan assets if amounts paid to the pension plan or plan participants are not affected in any manner by investment performance of the Separate Account).

upon the nature of the benefits provided to plan participants under the contract. The Second Circuit misunderstood the distinction drawn by Congress between fixed and variable annuity benefits payable to plan participants and erroneously concluded that, in using the word "benefits" in section 401(b)(2)(B), Congress intended to distinguish between fixed and variable rates of return.

The Second Circuit improperly equated the word "benefits" with the return to the pension plan sponsor under a participating contract, which will vary in amount with the investment performance of the General Account. The court of appeals said:

> Although Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. *The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides.*

(PA-8 to PA-9) (emphasis added). The Second Circuit ignored the fact that ERISA uniformly uses the word "benefits" to refer to benefit payments to plan participants and that, under GAC 50, they do not vary in amount.[36] The court erred in its analysis, because the return to the plan sponsor is irrelevant under section 401(b)(2)(B) in determining whether or not an insurance contract provides for guaranteed benefits.[37]

The Second Circuit paid no heed to the statute's consistent use of the term "benefits." In the more than 30 instances, in addition to the reference in section 401(b)(2), in which ERISA refers

[36] It is not disputed that all the benefits payable under GAC 50 are fixed benefits, payable to plan participants in amounts determined by the provisions of the Sperry Plan. The contract does not provide for any benefits to participants in amounts that vary based upon the experience of Hancock's General Account (JA-121, JA-241 to JA-243).

[37] The fact that a contract participates in the varying investment experience of an insurer's General Account does not transform a fixed benefit contract into a variable annuity policy. *Spellacy*, 131 A.2d at 839-40.

to a "benefit,"[38] that term is used in connection with a payment to a plan participant or beneficiary.[39] In no instance did Congress use the term "benefit" in ERISA in any other sense.[40] The term "benefits" in the "guaranteed benefit policy" provision,

[38] *See, e.g.*, ERISA §§ 3(2), 3(7), 3(8), 3(19), 3(22), 3(23), 3(34)-(36), 103(b), (d) and (e), 105(a), 203(a)-(e), 204(b)-(h), 206(a)-(d), 301(b)(2)-(3), 404(a)(1), 408(c)(1), 4022A, 29 U.S.C. §§ 1002(2), 1002(7), 1002(8), 1002(19), 1002(22), 1002(23), 1002(34)-(36), 1023(b), (d) and (e), 1025(a), 1053(a)-(e), 1054(b)-(h), 1056(a)-(d), 1081(b)(2)-(3), 1104(a)(1), 1108(c)(1), 1322(a) (1988 & Supp. 1991).

[39] *See, e.g.*, § 3(7) (defining a "participant" as one "who is or may become eligible to receive a benefit of any type from an employee benefit plan"); § 3(8) (defining a "beneficiary" as one "designated by a participant . . . who is or may become entitled to a benefit"); § 3(22) (defining participant's entitlement to "normal retirement benefit"); § 3(23) (defining a participant's "accrued benefit"); § 103(e) (referring to benefit payments to participants which have been guaranteed by insurance companies). *See also Mack Boring*, 930 F.2d at 273 ("the term 'benefit,' when used in ERISA, uniformly refers only to payments due the plan participants or beneficiaries"); *Harris I* (PA-57 to PA-58) (same). The DOL has confirmed this definition of the term "benefits." *See* Advisory Opinion No. 78-8A, *supra*, at 5 (construing section 401(b)(2) as referring to "the payments to which a participant or beneficiary would be entitled") (A-107).

[40] The Second Circuit, in rejecting Congress' consistent use of the term "benefit" throughout the statute as referring to a benefit payment to a participant, purported to rely upon language in the Conference Report. In that respect, the court of appeals again erred. That report states:

> An insurance company also is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company. If the policy guarantees basic payments but other payments vary with, *e.g.*, investment performance, then the variable part of the policy and the assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

Conference Report, *supra*, at 5077. The Second Circuit apparently construed the word "payments" as referring to investment income allocated to the contract. It is clear, however, that the Conference Committee used "basic payments" to refer to fixed benefits payable to participants and "other payments" to mean variable benefits in order to distinguish fixed annuities supported by the insurer's General Account from variable annuities payable out of a Separate Account. *See Mack Boring*, 930 F.2d at 275 ("there is no indication that the word 'payments' in the Conference Report has a meaning

(Footnote continued)

therefore, is meant to refer to benefit payments provided to plan participants and beneficiaries "the amount of which is guaranteed by the insurer."[41] The term "guaranteed benefit" cannot properly be interpreted, as the Second Circuit construed it, to mean a guaranteed rate of return to either the plan or the plan sponsor.[42]

different from the meaning we give to the word 'benefits' in the statute"); *Harris I* (PA-57 to PA-58) ("The word 'benefit' in the guaranteed benefit policy exception, and the word 'payment' in the conference report, are no different; they too refer to benefits and payments to covered employees.").

[41] It is an established principle of statutory construction that, when a word is used in more than one instance in a statute, it should be construed to have the same meaning in all instances. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.' "); 2A Norman J. Singer & C. Dallas Sands, *Sutherland Statutory Construction* § 47.16 (4th ed. 1984 & Supp. 1989) (where the same word is used in more than one part of a statute, there is an "assumption that it means the same thing throughout the statute"). The Second Circuit's decision violates that principle by giving "benefit" a meaning in the "guaranteed benefit policy" provision different from its meaning in every other section of ERISA.

[42] The only arguably contrary circuit court authority, other than the Second Circuit decision, is the Seventh Circuit's decision in *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983). That decision is neither sound authority nor substantively correct. The Seventh Circuit reversed the district court's dismissal of the complaint, finding that a claim under ERISA had been stated, but did not decide on the merits that ERISA's fiduciary provisions applied to an insurer's contractual obligations under a General Account group annuity contract. *Id.* at 326-28. Upon rehearing, the Seventh Circuit expressly acknowledged the narrow context within which its opinion had been rendered ("merely" dismissal on the pleadings) and acknowledged that there were a "number of arguments" that ERISA had no applicability to the contract at issue in that case that the court had not considered. *Id.* at 328.

Examination of the court's reasoning in *Peoria* demonstrates that its broad conclusion was ill considered. The decision was made without reference to the DOL's interpretation of ERISA and without any evident understanding of the practical reasons why ERISA could not apply in the context presented. In addition, *Peoria* contains only the most casual analysis of the "guaranteed benefit policy" provision.

(Footnote continued)

3. *The Phrases "To the Extent That" and "Provides for" Do Not Mean That General Account Contracts Are to Be Bifurcated Into Guaranteed and Non-Guaranteed Portions.*

The Second Circuit also misconstrued the "to the extent that" and "provides for" phrases in section 401(b)(2) as requiring an analysis of whether there are guaranteed and non-guaranteed portions of a General Account contract. The court identified the contractual cost of the existing benefits as the "guaranteed" portion of the contract and treated the contract's book value in excess of that cost as the "non-guaranteed" portion (PA-8 to PA-9). In doing so, it ignored the facts that (i) under GAC 50, Harris Trust can require Hancock to provide additional guaranteed benefits and (ii) the contract does not provide for the payment of any variable annuity benefits.

Under GAC 50, Hancock is obligated to the full extent of the book value of the contract to provide fixed guaranteed benefits at the direction of Harris Trust (JA-90, JA-96 to JA-97). Harris Trust, on the other hand, has the right, but not the obligation, to use any "free funds" to purchase future guaranteed benefits under the contract, in addition to benefits previously guaranteed. As the Third Circuit held in *Mack Boring*, nothing in section 401(b)(2) "require[s] that the benefits contracted for be delivered immediately." 930 F.2d at 273. Accordingly, Hancock's obligation to provide future guaranteed benefits under the contract satisfies the "provides for" language of that section.[43]

Moreover, in reversing a dismissal of the plaintiff's case on the pleadings, the circuit court based its decision on a broadly stated but patently unsound finding that an insurance company issuing a participating General Account contract is no different from "an investment advisor . . . given . . . authority to buy and sell securities at his discretion for the plan's account." 698 F.2d at 327. That analogy does not withstand even the most cursory examination. In contrast to the management of an insurance company General Account, upon which rests the guarantee of fixed benefit payments by the company, an investment advisor who administers a pool of assets assumes no risks and offers no guarantees of any kind. The superficiality of the court's analysis in *Peoria*, together with the uncertainties expressed by the court itself upon rehearing, demonstrates that the decision is entitled to little weight.

[43] The words "provide for" as they are commonly understood mean to make provision for prospectively. *See Mack Boring*, 930 F.2d at 273 ("The dictionary

(Footnote continued)

Moreover, given the distinctions in section 401(b)(2)(B) between General Account and Separate Account assets and between fixed and variable annuities, the "to the extent that" phrase can only be read to refer to an insurance company's obligation to pay fixed guaranteed benefits, rather than variable annuity benefits. The Third Circuit adopted that construction in *Mack Boring*:

> All benefits due plan participants under the DA contract at issue were guaranteed. There were no variable payments. Only payments owed to [the Plan] could be considered variable. As such, the entire DA contract comports with the "to the extent" limitation imposed on the definition of guaranteed benefit policy. Because the [contract] was a general account insurance contract which provided in its entirety for a guaranteed, fixed amount of benefits to be paid to the plan participants upon their retirement, we therefore conclude that, at least on its face, the guaranteed benefit policy exception of section 401(b)(2) encompasses the contract.

930 F.2d at 274-75 (footnotes omitted). Therefore, "to the extent that" a group annuity contract obligates the insurer to pay fixed, rather than variable, benefits to plan participants, it "provides for" guaranteed benefits. GAC 50 is a "guaranteed benefit policy" in its entirety, because none of Hancock's General Account assets can be used to pay any variable annuity benefits and the contract does not provide for the payment by Hancock of any such benefits.[44]

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definition of 'provide' is to 'make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.' ") (quoting Black's Law Dictionary (5th ed. 1979)).

[44] The 1977 Amendment to GAC 50 permitted the contractholder to direct Hancock to use the "free funds" for the payment of so-called "Non-Guaranteed Benefits" (JA-240 to JA-249). Such benefits were fixed in amount, and no plan participant was entitled to receive a benefit payment the amount of which varied based upon Hancock's General Account experience (JA-97, JA-242 to JA-243). The availability and use of this mechanism (which was terminated

(Footnote continued)

The Second Circuit's flawed interpretation of the "to the extent that" and "provides for" phrases caused it to treat the contract as if it could be divided into "guaranteed" and "non-guaranteed" portions. No such separate portions can, or do, exist. Because General Account contracts like GAC 50 do not have any segregated or identifiable assets associated with them, there are no specific assets that could be assigned to separate portions of the contract. Furthermore, because the contract's book value in its entirety can be used by the contractholder at any time to require the payment of additional guaranteed benefits, Hancock's contract obligations are not divisible.[45]

Finally, the Second Circuit's construction, if carried to its logical extreme, would lead to an absurd result. The court's decision would cause all of an insurer's General Account assets to be subjected to "plan assets" treatment by reason of even a single group annuity contract issued to an ERISA pension plan. Every participating General Account contract shares in the investment experience of the General Account and is likely at all times

in 1982 (JA-98; PA-17 to PA-18)) did not affect GAC 50's status as a guaranteed benefit policy, because Hancock was at all times obligated to the full extent of the book value of the contract to provide guaranteed benefits if directed to do so by Harris Trust.

[45] Having wrongly assumed that the contract could be divided into portions, the Second Circuit next assumed, erroneously, that the so-called "guaranteed" portion of the contract is insulated from positive or negative investment experience, while the "non-guaranteed" portion is affected by such experience (PA-8 to PA-9). The entire book value of the contract, however, not just the "free funds," varies in amount on the basis of the General Account's investment performance (JA-91). Indeed, the book value of the contract may increase as a result of positive investment experience while the amount of the "free funds" simultaneously declines. Positive investment experience will produce an increase in the amount of "free funds" under the contract only if other factors affecting the amount of "free funds" are assumed to be constant. For example, if Hancock is directed by the contractholder to provide additional guaranteed benefits under the contract, the "free funds" are immediately reduced by the "cost" of the benefits determined in accordance with the contract's annuity purchase rates. The book value of the contract, however, is unaffected.

to have "free funds" in some amount associated with it. Applying the Second Circuit's reading of the statute, an insurer would become a fiduciary with respect to at least a portion of each and every contract issued to an ERISA plan. The effect of the Second Circuit's decision, therefore, would be to subject all of an insurer's undifferentiated General Account assets to ERISA's fiduciary rules, requiring the insurer to manage its entire General Account for the exclusive benefit, simultaneously, of each pension plan contractholder, and to the exclusion of the interests of all its other customers. Plainly, the statute does not contemplate any such result.

B. *The Second Circuit Decision Conflicts With State Law, the McCarran-Ferguson Act and ERISA's Preemption Saving Clause.*

The Second Circuit decision creates an irreconcilable conflict between federal and state law. Under that decision, ERISA's fiduciary standards govern insurers' General Account activities — activities that are also subject to inconsistent state law standards and regulations. The Second Circuit has construed ERISA, therefore, in a manner that invalidates, impairs and supersedes state regulation of the business of insurance, in violation of the McCarran-Ferguson Act. Nothing in ERISA, however, evinces any intent by Congress to displace state regulation of insurance or to disrupt long-standing insurance company practices by subjecting an insurer's General Account assets to federal fiduciary requirements. Indeed, ERISA's preemption saving clause, ERISA § 514(b), 29 U.S.C. § 1144(b) (1988 & Supp. 1991), expressly reserves the regulation of the business of insurance to the States.[46]

[46] Section 514(b) provides, in relevant part:

> (b) Construction and application
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> • • •
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> (2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

1. *Congress Has Reserved to the States the Regulation of Insurance Company General Accounts.*

The McCarran-Ferguson Act embodies the basic federal policy that the States are exclusively responsible for regulating the "business of insurance." *See* 15 U.S.C. § 1011 *et seq.* (1988 & Supp. 1991). The McCarran-Ferguson Act provides, in pertinent part:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation . . . of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. §§ 1012(a), (b) (1988) (PA-93).

The McCarran-Ferguson Act was enacted to nullify the holding in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). As this Court has explained, the *South-Eastern Underwriters* decision upset the theretofore accepted understanding that "regulation of insurance transactions . . . rest[ed] exclusively with the States," *SEC v. National Secur., Inc.*, 393 U.S. 453, 458 (1969), and it "threatened the continued supremacy of the States in this area," *id.* at 459. The McCarran-Ferguson Act was intended "to turn back the clock" to establish that the States would once again have "a free hand in regulating the dealings between insurers and their policyholders." *Id.* at 459. *Accord State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962) (McCarran-Ferguson Act provided that "regulation and taxation of insurance should be left to the States"); *see Royal Drug*, 440 U.S. at 218 n.18 ("no question that *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies . . ." [emphasis in original]).

Although ERISA's preemption provision, ERISA § 514(a), 29 U.S.C. § 1144(a) (1988), is broad, the statute "saves" from preemption under section 514(b) any state law "which regulates insurance, banking or securities." Following the enactment of ERISA, this Court addressed the question of ERISA's effect, if any, on the McCarran-Ferguson Act, especially in light of the statute's preemption provision. In the leading case of *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court settled that question. The Court held that ERISA's preemption saving clause reaffirmed the McCarran-Ferguson Act's reservation of the business of insurance to the States. *Id.* at 742-47. As the Court explained:

> The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance," appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States.

Id. at 744 n.21.[47] *Accord FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

2. *The Second Circuit Decision Construes ERISA in a Manner That Would Invalidate, Impair and Supersede State Regulation of the Business of Insurance.*

The Second Circuit decision would force insurers to act as ERISA fiduciaries in connection with the administration and

[47] The Court also relied upon section 514(d), 29 U.S.C. § 1144(d) (1988), in which Congress explicitly provided that ERISA, although designed to preempt certain state laws, was not intended impliedly to amend or impair other federal laws. *See* 471 U.S. at 744 n. 21. That section declares that "[n]othing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States" (PA-95). *See Northern Group Services, Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85, 91-92 (6th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); Brummond, *supra*, at 120.

management of some portion of the assets in their General Accounts.[48] Those activities undoubtedly fall within the definition of the "business of insurance."[49] *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *Royal Drug*, 440 U.S. at 210-11; *National Securities, Inc.*, 393 U.S. at 458. As this Court has held, regulation that affects the insurer/policyholder relationship is at the core of the business of insurance. *E.g.*, *Metropolitan Life*, 471 U.S. at 743-44; *National Securities, Inc.*, 393 U.S. at 458.

The Second Circuit decision construes ERISA to impair state regulation of the business of insurance in several ways. Most fundamentally, the decision would impose ERISA's "solely in the interest of" standard on an insurer's relationship with its policyholder, thereby altering a contract arrangement sanctioned by the state, and would invalidate the state law requirements that General Account assets be administered to spread risk fairly and equitably among all General Account policyholders.[50] Moreover, the Second Circuit decision would displace the States' regulation of insurance by imposing federal fiduciary duties on

[48] The relationship between an insurer and insured is contractual in nature, and, at common law, an insurance company is not a fiduciary to its policyholders. *See, e.g.*, *Benefit Trust Life Ins. Co. v. Union Nat'l Bank of Pitt.*, 776 F.2d 1174, 1177 (3d Cir. 1985); *Rochester Radiology Assocs. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985); *Uhlman v. New York Life Ins. Co.*, 17 N.E. 363, 366 (N.Y. 1888).

[49] In its motion for summary judgment in *Harris I*, Hancock identified various state laws that governed the Hancock business practices alleged by Harris Trust to violate ERISA. In its opinion (PA-31 n.10), the district court noted that "[a]s Hancock shows, and as Harris Trust apparently concedes, the practices of which Harris Trust complains are clearly part of the 'business of insurance' " (PA-32).

[50] *E.g.*, N.Y. Ins. Law §§ 2403, 2606-08, 4239 (McKinney 1985); Conn. Gen. Stat. Ann. §§ 38-446 to -447, -488, 38a-815 to -816 (West 1992 & Supp. 1993); Mass. Gen. Laws Ann. ch. 176D, §§ 2-3, 3(7) & ch. 175, § 120 (West 1993); N.J. Stat. Ann. §§ 17:29B-3 to -4, 17B:30-2 to -4 (West 1985). *See* NYS Brief at 5-11.

General Account activities that have long been subject exclusively to state laws and regulations.[51] As the State of New York has noted, the changes required by the Second Circuit's decision

> will interfere with the nondiscriminatory treatment of policyholders and contractholders required by State law; . . . will interfere with the State's ability to ensure the financial stability of insurance companies operating in the State; and . . . will severely impair the administration of the insurance laws by insurance regulators.

NYS Brief at 3.

Because it imposes ERISA fiduciary requirements on an insurer's administration and management of its General Account assets, the Second Circuit's construction of ERISA impairs and supersedes state regulation of the business of insurance in violation of the McCarran-Ferguson Act. Furthermore, by its construction, the Second Circuit also creates an internal inconsistency within ERISA itself. ERISA's preemption saving clause, as this Court held in *Metropolitan Life*, preserves the States' regulation of insurance. 471 U.S. at 742-47. The Second Circuit's interpretation of the "guaranteed benefit policy" provision, however, displaces that regulation.

3. *Congress Nowhere Expressed an Intent to Displace State Regulation or to Subject an Insurer's General Account Assets to Federal Fiduciary Duties.*

This Court has frequently said that, when Acts of Congress are alleged to change an industry's long-standing practices, it is expected that Congress will have mentioned and discussed the contemplated change. *See Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992) (not plausible to attribute to Congress an intention to upset established practices without a mention of that intention somewhere in the statute or in the congressional annals); *Mead Corp. v. Tilley*, 490 U.S. 714, 724 (1989) (Conference Committee would have discussed fully areas where ERISA altered

[51] *See* NYS Brief at 11-12.

prior law); *United Savings Ass'n v. Timbers of Inwood Forest Associates Ltd.*, 484 U.S. 380 (1988) (major change in existing rules not likely to have been made without specific provision in the text of the statute); *Watt v. Alaska*, 451 U.S. 259, 271 n.13 (1981) ("it is almost inconceivable that Congress knowingly would have changed substantially a longstanding formula for distribution of substantial funds without a word of comment").

In keeping with that established rule of statutory interpretation, this Court has been unwilling to construe a federal statute to undermine the federal policy that insurance regulation will be left to the States. As the Court explained in *Variable Annuity Life Ins. Co.*:

> We start with a reluctance to disturb the state regulatory schemes that are in actual effect, either by displacing them or by superimposing federal requirements on transactions that are tailored to meet state requirements. When the States speak in the field of "insurance," they speak with the authority of a long tradition. For the regulation of "insurance," though within the ambit of federal power . . ., has traditionally been under the control of the States.

359 U.S. at 68-69. Accordingly, a federal statute will not be construed to deviate from that policy in the absence of language compelling that result. *Holliday*, 498 U.S. at 62 (presumption that Congress does not intend to preempt areas of traditional state regulation); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Prudential Life Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946).

Despite the sea change that ERISA's application to insurance company General Accounts would cause to fundamental insurance industry practices, neither the statute nor its legislative history reflects in any way an intent to affect those practices. Congress was unquestionably familiar with insurance industry products and operations and the States' extensive regulation in

those areas. Notwithstanding the fact that more than 1,300 persons, including 54 members of Congress, 46 insurance industry representatives and three State insurance regulators, provided oral or written statements during 93 days of hearings over the course of nine years (A-5 to A-9; A-19 to A-64), there is nothing in the legislative record to suggest that Congress was contemplating any legislative change to the insurance industry's General Account practices or to the States' regulation of those practices. Furthermore, not one of the 13 committee reports issued (A-1 to A-2), not one of the 20 bills and 24 amendments considered (A-9 to A-12), and none of the remarks made on the floor of Congress (A-15 to A-18) reflect any design by Congress to do so.

This overwhelming legislative record confirms the conclusion that ERISA's fiduciary responsibility provisions do not apply to insurers' administration and management of their General Accounts. As this Court said in *Massachusetts v. Morash*, the Court will not disturb the federal policy allocating responsibility for insurance regulation to the States, in the absence of any indication that the statute was designed to do so:

> The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with "the separate spheres of governmental authority preserved in our federalist system."

490 U.S. at 119 (quotation omitted). Because the statute and its legislative history contain no evidence of a congressional intent to change that policy, this Court should construe ERISA to avoid the unheralded reallocation of federal and state responsibilities that the Second Circuit's decision will produce.

C. *The DOL Has Consistently Adhered to the View That Insurance Company General Account Assets Are Not Plan Assets.*

Since ERISA's enactment, the DOL, in its pronouncements and enforcement practices, has consistently adhered to the view

that ERISA's fiduciary obligation provisions do not apply to an insurance company's assets under General Account contracts like GAC 50. Indeed, not once since 1974 has the DOL commenced any enforcement proceeding invoking the ERISA fiduciary rules as applicable to insurance company General Account practices. Because the DOL's interpretation is a valid construction of the statute, rendered by the agency charged by Congress with ERISA's implementation and enforcement,[52] that interpretation is entitled to great deference.

Shortly after ERISA was enacted, the DOL interpreted the statute as not applying to General Account assets. In its ERISA Interpretive Bulletin 75-2 (February 6, 1975) ("IB 75-2"), the DOL stated:

> If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets.

40 Fed. Reg. 31,598 (1975) (A-100), *codified as revised*, 29 C.F.R. 2509.75-2(b) (1991) (PA-97). Immediately after the publication of IB 75-2, the DOL issued its Advisory Opinion 75-79, which referenced the statute's fiduciary responsibility provisions (A-103). The DOL reaffirmed there that, in the case of General Account group annuity contracts, the insurance company's General Account assets are not "plan assets":

> Our latest interpretative bulletin, ERISA IB 75-2, a copy of which is enclosed herewith, makes clear that when a plan purchases a policy or policies on an insurance company's general assets account, the plan assets consist of the policy, and not the underlying assets of the insurance company.

The rationale for IB 75-2 was later explained to Congress in detail by the Assistant Secretary of Labor for Labor Management Relations in a 1975 oversight hearing:

[52] *See* ERISA § 505, 29 U.S.C. § 1135 (1988).

> So we exercised our authority to interpret the law and we published an interpretive bulletin . . . stating that the mere investment of plan assets by a plan in a corporate entity or partnership does not convert the assets of the corporation or partnership into plan assets and does not make the managers of the corporation or partnership fiduciaries to the plan. Those managers are thus not restricted from engaging in normal business transactions, including transactions with persons who happen to be parties in interest with respect to the policyholder plans.

Oversight on ERISA: Hearings on Pub. Law No. 93-406 Before the Subcommittee on Labor Standards of the House Comm. on Educ. and Labor, 94th Cong., 1st Sess., 391 (1975).

More recently, on November 13, 1986, the DOL published a final regulation dealing with the definition of "plan assets" in which it reaffirmed its view.[53] The DOL there stated the basic

[53] The Department of Labor had reaffirmed the continuing validity of IB 75-2 on numerous previous occasions. For example, in the Proposed Regulation Relating to the Definition of Plan Assets, the Department stated:

> Normally, when an employee benefit plan invests in another entity, it has exchanged an asset (usually cash) for another asset (usually a security issued by the entity) that gives the plan certain rights with respect to the underlying assets of the entity. With respect to most investments, the assets that a plan is considered to have acquired by reason of an investment are determined by reference to the terms of the instrument and applicable non-ERISA law. This general principle was first recognized by the Department in Interpretive Bulletin 75-2, which states that, generally, investment by a plan in securities of a corporation of [sic] partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets."

50 Fed. Reg. 961 (1985). *See also* Proposed Regulations Relating to Definition of Plan Assets and to Establishment of Trusts, 44 Fed. Reg. 50,363, 50,364 n.4 (1979) (to be codified at 29 C.F.R. pt. 2550) (proposed Aug. 28, 1979) (section 401(b)(2) "mean[s] generally that assets held in an insurer's general

(Footnote continued)

general principle that "when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity." 29 C.F.R. § 2510.3-101(a)(2) (1991) (PA-99). The DOL further stated that the plan asset regulation was intended to make no substantive change in the portion of IB 75-2 dealing with insurance contracts and that, in that respect, the interpretive bulletin would have continuing applicability (PA-111).[54]

Ignoring the DOL's repeated statements and consistent interpretation and enforcement policy, the Second Circuit concluded that there was "confusion" in the DOL's published releases. In reaching that conclusion, the court misconstrued and misapplied two DOL Advisory Opinions, Advisory Opinions 83-51A and 78-8A, that, it said, were "seemingly contradictory" to IB 75-2 (PA-11 to PA-12).[55] In fact, those opinions relate to

account to support benefits under a contract purchased by a plan are not plan assets. . ."); Prohibited Transaction Exemption 81-82, 46 Fed. Reg. 46,443, 46,444 (1981); Prohibited Transaction Exemption 79-41, 44 Fed. Reg. 46,365, 46,368 (1979).

[54] Inasmuch as the principles underlying the plan asset regulation and IB 75-2 are the same, an analysis of GAC 50 under the regulation also leads to the conclusion that Hancock's General Account assets are not plan assets. The regulation provides that, if an investment is treated as indebtedness under state law without substantial equity features, the debt instrument is a plan asset, but the creditor's underlying assets are not. 29 C.F.R. §§ 2510.3-101(a)(2), (b)(1) (1991) (PA-99 to PA-100). The regulation further provides, with respect to a plan's investment in an equity interest of an entity, that the entity's underlying assets are not plan assets if the entity is an operating company, *i.e.*, an entity primarily engaged in the production or sale of a product or service other than the investment of capital. 29 C.F.R. § 2510.3-101(c) (1991) (PA-99 to PA-102). Under either test, General Account assets under a contract like GAC 50 are not plan assets.

[55] The court of appeals compounded its error by interpreting IB 75-2 as dealing solely with prohibited transactions (PA-12 to PA-13). First, there is no support in the regulatory history or the wording of the statute for such a distinction. Second, the DOL's references to IB 75-2 in the contemporaneously issued Advisory Opinion 75-79 and in subsequent pronouncements (*see supra* notes 53-54) demonstrate that its interpretation was intended to have broad applicability beyond the prohibited transaction context. *See Mack Boring*, 930 F.2d at 276.

Separate Account, not General Account, contracts.[56] *Mack Boring*, 930 F.2d at 276 n.18.

IB 75-2 and the DOL's subsequent pronouncements are entitled to great deference under the standard set forth by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore*, the Court stated that it will give an administrative pronouncement weight depending upon "the thoroughness evidenced in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.

Under *Skidmore*, the DOL's long-standing construction of the statute is entitled to great weight First, its interpretation was based upon thorough and valid reasoning as articulated in IB 75-2 and later pronouncements and is a "reasonable" construction of the statute. *E.E.O.C. v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1236 (1991) (Scalia, J., concurring); *see Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). Second, the DOL rendered its interpretation virtually contemporaneously with the enactment of ERISA. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976). Third, IB 75-2 has been consistently applied and reaffirmed by the DOL since its issuance. Because the DOL's construction of the statute as it relates to General Account assets comports with the language of section 401(b)(2), and because any other construction flies in the face of both the statute as a whole and its legislative history, this Court should adopt the DOL's authoritative interpretation.

[56] *See supra* note 35.

Conclusion

The judgment of the court of appeals, insofar as it reversed the judgment of the district court dismissing the action, should be reversed.

May 20, 1993

Respectfully submitted,

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No. 92-1074 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF FOR PETITIONER

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"Study of the Cost of Mandatory Vesting Provision Proposed for Private Pension Plans (Grubbs Report)," committee print of the Subcommittee on Labor of the Senate Labor and Public Welfare Committee, 93rd Congress, February 1973. (Reprinted on page 425 of the Senate Labor and Public Welfare Committee hearings.)

"Estimates of the Cost of Vesting in Pension Plans," committee print of the General Subcommittee on Labor of the House Education and Labor Committee, 93rd Congress, February 1973.

"Material Relating to Administration Proposal Entitled the 'Retirement Benefits Tax Act,' " committee print of the House Ways and Means Committee, 93rd Congress, April 18, 1973.

"Summary of Proposals for Private Pension Plan Reform," committee print prepared for the Subcommittee on Private Pension Plans of the Senate Finance Committee, by the Joint Committee on Internal Revenue Taxation, 93rd Congress, May 16, 1973.

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"Tax Treatment of Pension Plans," committee print prepared for the House Ways and Means Committee by the Joint Committee on Internal Revenue Taxation 93rd Congress:

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"Digest of Statements on Proposals for Private Pension Plan Reform," committee print of the Joint Committee on Internal Revenue Taxation, 93rd Congress:

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"Summary of H.R. 4200; Retirement Income Security for Employees Act, as Passed by the Senate," committee print prepared for the use of the Senate Financial Committee by the Joint Committee on Internal Revenue Taxation, 93rd Congress, October 9, 1973.

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"Private Pension Plan Reform," Hearings before the Subcommittee on Private Pension Plans of the Senate Finance Committee on S. 4, S. 1179 and S. 1631, 93rd Congress:

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[The House Ways and Means Committee held no formal hearings on pension legislation in the 93rd Congress, but instead requested written statements from interested parties on H.R. 10470 which was identical to the legislation passed by Senate (H.R. 4200 as passed in the Senate). These written statements were published in the listed committee prints.]

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H.R. 2 as introduced by Mr. Dent, *et al.* and referred to the House Education and Labor Committee, 93rd Congress, January 3, 1973.

S. 4 as introduced by Mr. Williams, *et al.* and referred to the Senate Labor and Public Welfare Committee, 93rd Congress, January 4, 1973.

H.R. 4200 as introduced by Mr. Broyhill of Virginia, *et al.* and referred to the House Ways and Means Committee, 93rd Congress, February 8, 1973.

S. 1179 as introduced by Mr. Bentson and referred to the Senate Finance Committee, 93rd Congress, March 13, 1973.

S. 4 as reported (Senate Report No. 93-127) with an amendment, April 18, 1973.

Amendments intended to be proposed to S. 4:

Amend No.	*Proposed by*	*Date*
378	Mr. Mondale	July 18, 1973
379	Mr. Mondale	July 18, 1973
401	Mr. Stevenson	July 20, 1973
478	Mr. Taft	Sept. 13, 1973
479	Mr. Taft	Sept. 13, 1973
481	Mr. Hartke	Sept. 13, 1973
482	Mr. Hartke	Sept. 13, 1973
483	Mr. Hartke	Sept. 13, 1973
485	Mr. Hartke	Sept. 13, 1973
488	Mr. Jackson	Sept. 17, 1973
489	Mr. Jackson	Sept. 17, 1973
496[1]	Mr. Nelson, *et al.*	Sept. 17, 1973
497	Mr. Nelson, *et al.*	Sept. 17, 1973
503	Mr. Curtis	Sept. 18, 1973
504	Mr. Buckley	Sept. 18, 1973
505	Mr. Nelson	Sept. 18, 1973
506	Mr. Nelson	Sept. 18, 1973
507	Mr. Tunney	Sept. 18, 1973
508	Mr. Hartke	Sept. 18, 1973

H.R. 4200 as reported (House Report No. 93-298) with amendments, June 20, 1973.

H.R. 4200 as passed House and referred to the Senate Finance Committee, June 28, 1973.

[1] Amendment No. 496 as intended to be proposed to S. 4 (in the nature of a substitute) is a compromise between S. 4, the Senate Labor and Public Welfare's bill, and S. 1179, the Senate Finance's bill. Amendment No. 496 was adopted September 18, 1973.

Amendments intended to be proposed to H.R. 4200:

Amend No.	*Proposed by*	*Date*
380	Mr. Mondale	July 18, 1973
381	Mr. Mondale	July 18, 1973

S. 1179 as reported (Senate Report No. 93-383) with amendments, August 21, 1973.

Amendments intended to be proposed to S. 1179:

Amend No.	*Proposed by*	*Date*
480	Mr. Taft	Sept. 13, 1973
484	Mr. Hartke	Sept. 13, 1973
495	Mr. Tunney	Sept. 17, 1973

H.R. 4200 as reported (Senate Report No. 93-394) without amendment, September 17, 1973.

H.R. 4200 as passed Senate amended, September 19, 1973. [The Senate amended H.R. 4200 by adding S. 4 as amended to H.R. 4200, as Section 2.]

H.R. 2 as reported (House Report No. 93-533) with an amendment, October 2, 1973.

H.R. 12481[2] as introduced by Mr. Ullman *et al.* and referred to the House Ways and Means Committee, 93rd Congress, February 4, 1974.

H.R. 12481 as reported (House Report No. 93-799), February 5, 1974.

[2] The House Ways and Means Committee issued tentative drafts of language under consideration by the Committee prior to the introduction of H.R.12481 and H.R.12855:

Committee Print No. 1, House Ways and Means Committee draft of the Employee Benefit Security Act of 1973, November 21, 1973.

Committee Print No. 2, House Ways and Means Committee draft of the Employee Benefit Security Act of 1974, December 21, 1973.

H.R. 12855 as introduced by Mr. Ullman *et al.* and referred to the House Ways and Means Committee, 93rd Congress, February 19, 1974.

H.R. 12906 as introduced by Mr. Dent, February 20, 1974.

H.R. 12855 as reported (House Report No. 93-807), February 21, 1974. [H.R. 12855, which superseded H.R. 12481, was adopted by the House as an amendment to H.R. 2 as Title II.]

H.R. 2 as passed by the Senate amended, March 4, 1974. [The Senate amended H.R. 2 by striking all House language and inserting the language of H.R. 4200 in lieu thereof.]

H. Con. Res. 609 as introduced by Mr. Ullman, August 20, 1974.

H. Con. Res. 609 received August 21, 1974.

H. Con. Res. 609 August 22, 1974.

RELATED BILLS

89th Congress

S. 1575 as introduced by Mr. Hartke and referred to the Senate Finance Committee, 89th Congress, March 18, 1965. (Reprinted on page 1 of item Hearings before the Senate Finance Committee on S. 1575.)

90th Congress

H.R. 5741 as introduced by Mr. Perkins and referred to the House Education and Labor Committee, 90th Congress, February 20, 1967. (Reprinted on page 2 of Hearings before the General Subcommittee on Labor of the House Education and Labor Committee on H. 5741.)

S. 1024 as introduced by Mr. Yarborough and referred to the Senate Labor and Public Welfare Committee, 90th Congress, February 20, 1967. (Reprinted on page 48 of Hearings before the Subcommittee on Labor of the Senate Labor and Public Welfare Committee on S. 3421, S. 1024, S. 1103, and S. 1255.)

S. 1103 as introduced by Mr. Javits and referred to the Senate Labor and Public Welfare Committee, 90th Congress, February 28, 1967. (Reprinted on page 91 of Hearings before the Subcommittee on Labor of the Senate Labor and Public Welfare Committee on S. 3421, S. 1024, S. 1103, and S. 1255.)

H.R. 6498 as introduced by Mr. Dent and referred to the House Education and Labor Committee, 90th Congress, March 2, 1967. (Unavailable for inclusion.)

S. 3421 as introduced by Mr. Yarborough and referred to the Senate Labor and Public Welfare Committee, 90th Congress, May 2, 1968. (Reprinted on page 4 of Hearings before the Subcommittee on Labor of the Senate Labor and Public Welfare Committee on S. 3421, S. 1024, S. 1103, and S. 1255.)

H.R. 6498 as reported (House Report No. 90-1867), September 5, 1968.

91st Congress

H.R. 1045 as introduced by Mr. Dent and referred to the House Education and Labor Committee, 91st Congress, January 3, 1969.

H.R. 1046 as introduced by Mr. Dent and referred to the House Education and Labor Committee, 91st Congress, January 3, 1969.

S. 2167 as introduced by Mr. Javits and referred to the Senate Labor and Public Welfare Committee, 91st Congress, May 14, 1969.

S. 3517 as introduced by Mr. Hartke *et al.* and referred to the Senate Finance Committee, 91st Congress, February 26, 1970.

S. 3589 as introduced by Mr. Javits *et al.* and referred to the Senate Labor and Public Welfare Committee, 91st Congress, March 13, 1970.

H.R. 16462 as introduced by Mr. Ayres *et al.* and referred to the House Education and Labor Committee, 91st Congress, March 16, 1970.

S. 4326 as introduced by Mr. Williams of New Jersey and referred to the Senate Labor and Public Welfare Committee, 91st Congress, September 9, 1970.

S. 4327 as introduced by Mr. Williams of New Jersey and referred to the Senate Labor and Public Welfare Committee, 91st Congress, September 9, 1970.

92nd Congress

H.R. 1269 as introduced by Mr. Dent and referred to the House Education and Labor Committee, 92nd Congress, January 22, 1971.

S. 2 as introduced by Mr. Javits and referred to the Senate Labor and Public Welfare Committee, 92nd Congress, January 25, 1971.

S. 3598 as introduced by Mr. Williams *et al.* and referred to the Senate Labor and Public Welfare Committee, 92nd Congress, May 11, 1972.

S. 3012 as introduced by Mr. Curtis *et al.* (Administration's bill) and referred to the Senate Finance Committee, 92nd Congress, December 14, 1971.

S. 3012 as introduced by Mr. Curtis *et al.* (Administration's bill) and referred to the Senate Finance Committee, 92nd Congress, December 14, 1971.

S. 3024 as introduced by Mr. Javits *et al.* (by request) and referred to the Senate Labor and Public Welfare Committee, 92nd Congress, December 14, 1971.

H.R. 12272 as introduced by Mr. Mills of Arkansas *et al.* (Administration's bill) and referred to the House Ways and Means Committee, 92nd Congress, December 14, 1971. (See House Document No. 92-182 for Presidential message.)

H.R. 12337 as introduced by Mr. Erlenborn *et al.* (Administration's bill) and referred to the House Education and Labor Committee, 92nd Congress, December 15, 1971.

S. 3598 as reported Senate (Senate Report No. 92-1150) with an amendment by the Senate Labor and Public Welfare Committee, September 15, 1972.

S. 3598 as reported Senate (Senate Report No. 92-1224) with additional amendments by the Senate Finance Committee, September 25, 1972.

93rd Congress

H.R. 462 as introduced by Mr. Dent *et al.* and referred to the House Education and Labor Committee, 93rd Congress, January 3, 1973.

S. 75 as introduced by Mr. Griffin and referred to the Senate Finance Committee and the Senate Labor and Public Welfare Committee, 93rd Congress, January 4, 1973.

H.R. 7157 as introduced by Mr. Mills of Arkansas *et al.* (Administration's bill) and referred to the House Ways and Means Committee, 93rd Congress, April 18, 1973.

S. 1631 as introduced by Mr. Hansen *et al.* and referred to the Senate Finance Committee, 93rd Congress, April 18, 1973.

H.R. 10470 as introduced by Mr. Ullman and referred to the House Ways and Means Committee, 93rd Congress, September 24, 1973.

H.R. 10489 as introduced by Mr. Erlenborn *et al.* and referred to the House Ways and Means Committee, 93rd Congress, September 24, 1973.

H.R. 12781 as introduced by Mr. Dent and referred to the House Education and Labor Committee, 93rd Congress, February 13, 1974.

CONGRESSIONAL DEBATES

93rd Congress

119 Congressional Record (Daily Edition) - 93rd Congress, 1st Session - 1973:

September 17, 1973	p. D1025
September 18, 1973	p. D1033
September 19, 1973	pp. D1041-42

120 Congressional Record (Daily Edition) - 93rd Congress, 2nd Session - 1974:

February 26, 1974	p. D140
February 27, 1974	p. D148
February 28, 1974	pp. D156-57
March 4, 1974	p. D169
April 2, 1974	p. D341
August 20, 1974	p. D1032
August 22, 1974	pp. D1046-47

REMARKS ON THE FLOOR OF CONGRESS

Remarks by Mr. Williams upon introduction of S. 4, January 4, 1973, pp. S34-52.

Remarks by Mr. Dent regarding private pension plan legislation, January 6, 1973, p. S65.

Remarks by Mr. Bentsen upon introduction of S. 1179, March 13, 1973, pp. S4423-35.

House consideration and passage of H.R. 4200, June 27, 1973, pp. H5481-83. [H.R. 4200 as considered and passed the House did not contain any provisions eventually included in P.L. 93-406.]

Remarks by Mr. Mondale upon submission of Amendments Nos. 378 and 379 as intended to be proposed to S. 4, and Amendments Nos. 380 and 381 as intended to be proposed to H.R. 4200, July 18, 1973, pp. S13785-86.

Remarks by Senators Taft and Hartke upon submission of Amendments Nos. 478, 479, 482, 485 as intended to be proposed to S. 4, and Amendments Nos. 480, 484 as intended to be proposed to S. 1179, September 13, 1973, pp. S16471-75.

Remarks by Mr. Hartke regarding portability, September 13, 1973, pp. S16489-90.

Remarks by Mr. Jackson upon submission of Amendments Nos. 488 and 489 as intended to be proposed to S. 4, September 17, 1973, pp. S16623-25.

Senate consideration and amendment of S. 4 [S. 1179 was not considered separately but in conjunction with S. 4 in the Senate.]:

September 17, 1973	pp. S16675-87
September 18, 1973	pp. S16694-761
	p. S16779
	pp. S16824-39
September 19, 1973	pp. S16853-61
	pp. S16866-915

Senate consideration, amendment and passage of H.R. 4200, September 19, 1973, pp. S16915, S16927. [Passage of H.R. 4200 and appointment of conferees; indefinite postponement of S. 4 and S. 1179, September 19, 1973.]

"Summary of the Committee on Ways and Means Decisions Relating to the Tax Title of the Employee Benefit Security Act of 1974," as submitted by Mr. Ullman for printing in the Congressional Record, February 4, 1974, pp. H455-57.

House consideration, amendment and passage (p. H1342) of H.R. 2:

February 25, 1974	pp. H1094-118
February 26, 1974	pp. H1126-82
February 27, 1974	pp. H1243-51
February 28, 1974	pp. H1278-343

Senate consideration, amendment and passage of H.R. 2:

March 4, 1974	pp. S2611-45 [Passage of H.R. 2 and appointment of conferees, p. S2645.]

House disagreement to Senate amendment of H.R. 2, agreement to Senate request for conference and appointment of conferees, April 2, 1974, p. H2388.

Conference Report (House Report No. 93-1280) to accompany H.R. 2 submitted to the House:

August 12, 1974	pp. H8163-70
August 13, 1974	pp. H8217-311

Conference Report (Senate Report No. 93-1090) to accompany H.R. 2 submitted to the Senate, August 13, 1974, p. S14737.

House consideration and agreement to the Conference Report on H.R. 2, August 20, 1974, pp. H8696-719. [House agreement, p. H8719.]

House consideration and agreement to H. Con. Res. 609, a resolution authorizing the Clerk to make corrections in H.R. 2, August 20, 1974, pp. H8720-22.

Senate consideration and agreement to the Conference Report on H.R. 2, August 22, 1974, pp. S15737-74. [Senate agreement, p. S15772.]

Senate consideration and agreement to H. Con. Res. 609, August 22, 1974, pp. S15734-37.

MISCELLANEOUS MATERIAL

"Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans," by the President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, January 15, 1965.

House Document No. 93-82, "Recommendations for Pension Reform," a message from The President of the United States, December 8, 1971.

House Document No. 92-182, "Private Pension Plans," a message from The President of the United States, December 8, 1971.

"Study of Pension Plan Termination, 1972," a final report by the Department of the Treasury and Department of Labor, August 1973.

Remarks and Statement by The President of the United States upon signing the Employee Retirement Income Security Act of 1974 (P.L. 93-406) into law, 10 Pres. Doc. 1084-85 (1974).

Persons and Organizations Who Provided Oral and Written Statements to Congress

Persons and Organizations Who Provided Oral and Written Statements to Congress

Members of Congress

1. Anderson, Hon. John B., a Representative in Congress from the State of Illinois
2. Baker, Hon. Howard H., a U.S. Senator from the State of Tennessee
3. Bennett, Hon. Charles E., a Representative in Congress from the State of Florida, statement of
4. Bentsen, Hon. Lloyd, a U.S. Senator from the State of Texas
5. Boland, Hon. Edward P., a Representative in Congress from the State of Massachusetts
6. Brown, Hon. Clarence J., a Representative in Congress from the State of Ohio
7. Broyhill, Hon. James T., a Representative in Congress from the State of North Carolina
8. Carney, Hon. Charles J., a Representative in Congress from the State of Ohio, including a prepared statement
9. Chiles, Hon. Lawton, a U.S. Senator from the State of Florida
10. Cohen, Hon. William S., a Representative in Congress from the State of Maine
11. Dingell, Hon. John D., a Representative in Congress from the State of Michigan
12. Driggs, Hon. John, Phoenix, Ariz.
13. Edwards, Hon. Jack, a Representative in Congress from the State of Alabama
14. Erlenborn, Hon. John N., a Representative in Congress from the State of Illinois
15. Esch, Hon. Marvin L., a Representative in Congress from the State of Michigan
16. Findley, Hon. Paul, a Representative in Congress from the State of Illinois
17. Fraser, Hon. Donald M., a Representative in Congress from the State of Minnesota

18. Griffin, Hon. Robert P., a U.S. Senator from the State of Michigan
19. Griffiths, Hon. Martha W., a Representative in Congress from the the State of Michigan
20. Halpern, Hon. Seymour, a Representative in Congress from the State of New York, including a prepared statement
21. Hanrahan, Hon. Robert P., a Representative in Congress from the State of Illinois
22. Hartke, Hon. Vance, a U.S. Senator from the State of Indiana
23. Harvey, Hon. James, a Representative in Congress from the State of Michigan
24. Heinz, Hon. H. John, III, a Representative in Congress from the State of Pennsylvania
25. Hillis, Hon. Elwood H., a Representative in Congress from the State of Indiana
26. Javits, Hon. Jacob K., a U.S. Senator from the State of New York
27. Johnson, Hon. Harold T., a Representative in Congress from the State of California
28. Keogh, Hon. Eugene J., a former Representative in Congress from the State of New York
29. Long, Hon. Clarence D., a Representative in Congress from the State of Maryland
30. Mallary, Hon. Richard W., a Representative in Congress from the State of Vermont
31. McClory, Hon. Robert, a Representative in Congress from the State of Illinois
32. McCloskey, Hon. Paul N., Jr., a Representative in Congress from the State of California
33. Meeds, Hon. Lloyd, a Representative in Congress from the State of Washington
34. Mollohan, Hon. Robert H., a Representative in Congress from the State of West Virginia
35. Mondale, Hon. Walter F., a U.S. Senator from the State of Minnesota

36. Moorhead, Hon. William S., a Representative in Congress from the State of Pennsylvania, including a prepared statement
37. Nelsen, Hon. Ancher, a Representative in Congress from the State of Minnesota
38. Nelson, Hon. Gaylord, a U.S. Senator from the State of Wisconsin
39. Nichols, Hon. Bill, a Representative in Congress from the State of Alabama
40. Percy, Hon. Charles H., a U.S. Senator from the State of Illinois
41. Podell, Hon. Bertram L., a Representative in Congress from the State of New York
42. Prouty, Hon. Winston L., a U.S. Senator from the State of Vermont
43. Railsback, Hon. Tom, a Representative in Congress from the State of Illinois
44. Randolph, Hon. Jennings, a U.S. Senator from the State of West Virginia
45. Roush, Hon. J. Edward, a Representative in Congress from the State of Indiana
46. St. Germain, Hon. Fernand J., a Representative in Congress from the State of Rhode Island
47. Sisk, Hon. B. F., a Representative in Congress from the State of California
48. Smith, Hon. Henry P., III, a Representative in Congress from the State of New York
49. Stevenson, Hon. Adlai E., III, a U.S. Senator from the State of Illinois, including a prepared statement
50. Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina
51. Waldie, Hon. Jerome R., a Representative in Congress from the State of California
52. Williams, Hon. Harrison A., a U.S. Senator from the State of New Jersey
53. Williams, Hon. Lawrence G., a Representative in Congress from the State of Pennsylvania

54. Wylie, Hon. Chalmers P., a Representative in Congress from the State of Ohio

Federal Officials

1. Ball, Hon. Robert M., Commissioner, Social Security Administration
2. Chapoton, John E., Tax Legislative Counsel, Department of the Treasury
3. Cohen, Hon. Edwin S., Assistant Secretary for Tax Policy
4. Cohen, Manuel F., former Chairman of the Securities and Exchange Commission
5. Cohen, Hon. Sheldon S., Commissioner of Internal Revenue
6. Donahue, Hon. Thomas R., Assistant Secretary of Labor for Labor-Management Services, Department of Labor
7. Fasser, Paul J., Assistant Secretary of Labor for Labor-Management, Department of Labor
8. Gold, Ronald B., Department of Treasury
9. Hall, John H., Deputy Assistant Secretary for Tax Policy, Treasury Department
10. Hickman, Frederic W., Assistant Secretary, Department of the Treasury
11. Hodgson, Hon. James D., Secretary of Labor
12. Kleiler, Frank M., Deputy Assistant Secretary for Labor Relations Planning and Evaluation, Department of Labor
13. Macy, Jr., Hon. John W., Chairman, U.S. Civil Service Commission
14. Morris, Dr. Frank E., Federal Reserve Bank of Boston, Mass.
15. Saxon, Hon. James J., Comptroller of the Currency
16. Segal, Hon. Joel, Deputy Assistant Secretary
17. Shultz, Hon. George P., Secretary of the Treasury
18. Solomon, Frederic, Director, Division of Examinations, Board of Governors of the Federal Reserve System

19. Surrey, Hon. Stanley S., Assistant Secretary, Department of the Treasury
20. Wirtz, Hon. W. Willard, Secretary of Labor

State Insurance Regulators

1. Bitzer, Frederick, Deputy Commissioner of Insurance, State of Connecticut
2. DuRose, Stanley, Jr., Commissioner of Insurance, State of Wisconsin; Chairman, National Association of Insurance Commissioners
3. Stern, Jr., Henry Root, Superintendent of Insurance of the State of New York

Representatives of Chambers of Commerce,
State and Local Governments,
and Civic and Religious Organizations

1. Agostinelli, Hon. Nathan G., Connecticut State Comptroller
2. American Library Association
3. Barron, Arthur W., Jr., Franciscan Sisters of the Sacred Heart
4. Bell, Jay T., Missouri Municipal League
5. Boynton, Edwin F., Chamber of Commerce of the United States
6. Brann, Lester W., Jr., Illinois State Chamber of Commerce
7. Brown, Larry R., Greater Canton (Ohio) Chamber of Commerce
8. Burris, Carol, Women's Lobby, Inc.
9. Crowley, John F., San Francisco Labor Council
10. Council of State Chambers of Commerce
11. Davis, Hilton, Chamber of Commerce of the United States
12. Denning, Layne J., City and County of Denver, Colo.
13. Fraser, Arvonne, Women's Equity Action League
14. Galper, Harvey, Urban Institute, Washington, D.C.
15. Gill, Hon. Edwin, Treasurer of North Carolina

16. Godwin, Gerald C., Pennsylvania State Association of Boroughs
17. Grieglak, Martin, Pennsylvania New Democratic Coalition
18. Gunther, John J., U.S. Conference of Mayors
19. Hillenbrand, Bernard F., National Association of Counties
20. Jones, Nicholas P., City of Janesville (Wis.)
21. Joseph, William J., Division of Pensions, State of New Jersey
22. Lesser, Leonard, Center for Community Change
23. Lucey, Hon. Patrick J., Governor, State of Wisconsin
24. McMichael, Jane, National Women's Political Caucus
25. Medoff, Joanne, Ripon Society
26. Melgard, Andrew A., Committee Executive, Chamber of Commerce Private Pension – Social Security Committee, on Behalf of the Chamber of Commerce of the United States
27. Miller, Betty G., City of Inkster, Mich.
28. Noble, S. D., Council of Profit Sharing Industries
29. Nordstrom, Carl C., Kansas Association of Commerce & Industry
30. Olson, Marianne, Pennsylvania New Democratic Coalition
31. Parsons, Samuel B., Delaware County (Pa.) Chamber of Commerce
32. Pritchard, Allen E., Jr., National League of Cities
33. Roach, Arvid, Director of the Bureau of Labor Services of New York City
34. Robinson, James L., United States Catholic Conference
35. Rutterford, Jr., Guy G., Ripon Society
36. Starr, Harold W., American National Red Cross
37. Stevens, Hon. Gerald F., Connecticut House of Representatives
38. Stone, Daniel E., City of Riverside, Cal.
39. Taylor, David L., South Jersey Chamber of Commerce
40. Thompson, Robert T., Chamber of Commerce of the United States

41. Walsh, John V. Dubuque (Iowa) Area Chamber of Commerce
42. Whittow, George, City of Milwaukee, Wis.
43. Willis, E. S., Chamber of Commerce of the United States
44. Worth, Larry D., City of New Castle, Pa.

Insurance Industry Representatives

1. American Life Convention and Life Insurance Association of America
2. American Life Insurance Association
3. Arends, Verne J., Northwestern Mutual Life Insurance Co.
4. Asbill, Mac, Jr., Massachusetts Mutual Life Insurance Co.; The Travelers Insurance Co.
5. Association of Life Underwriters
6. Attwood, James A., Equitable Life Assurance Society of the United States
7. Barberg, W. Warren, National Association of Life Underwriters; National Association of Life Underwriters Committee on Federal Law and Investigation
8. Campbell, J. Ronald, Lincoln National Life Insurance Co.
9. Carnation, Gould, Citadel Life Insurance Co. of New York
10. Cathles, Lawrence M., Jr., Aetna Life & Casualty Co.
11. Dobb, Harold, United States Life Insurance Co.
12. Ehlers, Edwin S., Lincoln Life Insurance Co.
13. Ellinger, Jay, Equitable Life Assurance Society of America
14. Ferguson, Francis E., Northwestern Mutual Life Insurance Co.
15. Green, Roger A., Mutual Life Insurance Co. of New York.
16. Hubbard, Buckley, Jr., National Association of Life Underwriters; Association for Advanced Life Underwriting

17. Hunter, Douglas B., Insurance Association of Connecticut; Connecticut Business & Industry Association; American Life Insurance Association; Connecticut General Life Insurance Co.
18. Hurd, G. David, Bankers Life Co.
19. Indianer, Paul S., Standard Life & Accident Insurance Co.
20. Johnson, Donald M., Aetna Life & Casualty
21. Kingston, Charles T., Association for Advanced Life Underwriting; National Association of Life Underwriters
22. Lapoe, W. G., Safeco Insurance Co.
23. Larkin, Jerry D., Great-West Life Assurance Co.
24. Life Insurance Association of America and American Life Convention
25. Mitchell, Thomas, Midland Mutual Life Insurance Co.
26. Mundee, C. Roy, Jr., Pan American Life Insurance Co.
27. New England Mutual Life Insurance Co.
28. Northwestern Mutual Life Insurance Co.
29. Orth, Frederick J., Unigard Insurance Group
30. Quinn, A. Peter, Jr., Massachusetts Mutual Life Insurance Co.
31. Rheingold, Arnold M., Empire State Mutual Life Insurance Co.
32. Rohm, C.E., Bankers Life Co.
33. Rosen, Lester A., National Association of Life Underwriters
34. Stamm, Charles H., III, Connecticut General Life Insurance Co.
35. Stehle, Raymond D., Massachusetts Mutual Life Insurance Co.
36. Tarver, Norman, Manufacturers' Life Insurance Co.
37. Thomas, W. S., Metropolitan Life
38. Thompson, Norm, Equitable Life Assurance Society of the United States
39. Townsend, Tom E., Aetna Life & Casualty
40. Ware, Robert C., Trustee Life Insurance Co.
41. Warren, Barbara, National Association of Life Underwriters

42. Webster, Joseph A., Jr., American Society of Chartered Life Underwriters
43. Whelehan, David D., Connecticut Mutual Life Insurance Co.
44. Witman, Andrew, Mutual Life Insurance Co. of New York
45. Wolper, Marshall I., Association for Advanced Life Underwriting.
46. Woodruff, Dale L., American Guaranty Life Insurance Co.

Representatives of Pension Plans and Plan Beneficiaries

1. Albright, Robert A., National Association of Manufacturers, U.S. Steel and Carnegie Pension Fund
2. American Association of Retired Persons
3. American Pension Conference
4. Backe, Richard, Joint Committee on Pensions
5. Baron, Robert W., Coordinator, USW, District 15, Pensioners Association
6. Baskin, Charles G., Pension Subcommittee of Golf Course Superintendents Association of America
7. Bertani, Albert R., Pacific Coast Pensioners Association
8. Brickfield, Cyril F., American Association of Retired Persons—National Retired Teachers Association
9. Cardon, John A., Washington, D.C., Ad Hoc Corporate Pension Fund Committee
10. Cikanek, Benjamin W., Chicago Area Retail Food Clerks Pension Fund
11. Council on Employee Benefits
12. Crozier, Edwin W., Retail Clerks Union & Employers Pension Fund
13. Cruikshank, Nelson H., President, National Council of Senior Citizens
14. Edwards, Thomas C., Teachers Insurance and Annuity Association of America, College Retirement Equities Fund
15. Flynn, Ralph J., Coalition of American Public Employees

16. Garfinkel, Arthur K., Retirement Fund of Retail Shoe Employees
17. G. eenberg, Bernard, Pension Department, United Steelworkers of America
18. Greenough, Dr. William C., Teachers Insurance & Annuity Association of America, College Retirement Equities Fund
19. Grubbs, Donald S., Jr., National Health & Welfare Retirement Association
20. Haase, Al S., National Conference on Public Employee Retirement Systems
21. Hayes, Frances X., New Jersey Brewery Employees Trust Fund
22. Houck, Kenneth L., Bethlehem Steel Corp., Ad Hoc Corporate Pension Fund Committee
23. Hughes, Peter, American Association of Retired Persons-National Retired Teachers Association
24. Hutton, William R., National Council of Senior Citizens
25. Ivers, Henry, Western Conference of Teamsters Pension Trust Fund
26. Janitors' Union Local No. 25 and Participating Employers Pension Trust
27. Joint Board of Trustees, Local 705, International Brotherhood of Teamsters, Pension Trust Fund
28. Jones, Edwin M., Esq., of the New York law firm of Shea, Gould, Climenko & Kramer, counsel for the Elgin National Industries Pension Plan and Trust
29. Kennedy, Jack E., National Council on Teacher Retirement
30. Landry, Jerome, National Conference on Public Employee Retirement Systems
31. Little, Thomas L., First National Retirement Corp. of America
32. Longnecker, Ed R., National Association of State Retirement Administrators
33. Miller, Bruce K., National Senior Citizens Law Center
34. Nash, Bernard E., American Association of Retired Persons—National Retired Teachers Association

35. Nathanson, Paul, National Senior Citizens Law Center
36. National Retired Teachers Association
37. Neal, Howard F., Western Pension Conference
38. Payne, William, State of California Public Employees Retirement System
39. Prewitt, Leonard, National Council on Teacher Retirement, National Education Association
40. Rodio, Frank, Jr., Review of U.S. Private Pension Plans
41. St. Martin, Arthur J., Procter & Gamble Employees Association
42. Sublett, James L., State Teachers Retirement System of Ohio
43. Sullivan, Clyde M., State of Wisconsin, Department of Employee Trust Funds
44. Sutherland, C. Bruce, Carpenter Funds of Northern California
45. Tennant, W. Jack, office of teacher retirement, National Education Association
46. Twinney, Marc, M., Jr., Ford Motor Co., Ad Hoc Corporate Pension Fund Committee
47. Tyson, Michael, Action Alliance of Senior Citizens in Greater Philadelphia
48. Western Conference of Teamsters Pension Trust

Representatives of Providers of Professional Services to Pension Plans

1. Adams, Lloyd, Vance, Sanders & Co., Inc.
2. Adams, Scott, Portland Brokerage Agency
3. American Bankers Association
4. Antin, Michael, Pension Attorney
5. Armstrong, John K., Armstrong & Bray
6. Arnold, E. Allen, Wyatt Co.
7. Aronsohn, Alan J. B., Robinson, Silverman, Pearce, Aronsohn, Sand & Berman
8. Asbill, Mac, Jr., American Bar Association
9. Association of Mutual Fund Plan Sponsors
10. Association of the Bar of the City of New York, Committee on Taxation

11. Attenborough, Roland M., Specialized Corporate Services
12. Augenblick, Robert L., Investment Company Institute
13. Augustine, Thomas S., Oregon Credit Union League
14. Barnard, John, Jr., Massachusetts Financial Services
15. Bassett, Preston C., Towers, Perrin, Forster & Crosby
16. Beaupre, Robert S., First National Bank
17. Berger, Paul, Arnold & Porter
18. Bernstein, Richard E., National Pension Consultants, Inc.
19. Bevan, Robert L., American Bankers Association
20. Biegel, Herman C., Lee, Toomey & Kent
21. Bingham, William J., Jr., First Bank System
22. Boersma, Vernon L., M.D.
23. Boggs, Thomas Hale, Jr., Donaldson, Lufkin & Jenrette, Inc.
24. Bokor, Bruce H., Greenberg, Traurig, Hoffman, Lipoff & Quentel, P.C.
25. Bolton, Frederick H., Pennsylvania Bar Association
26. Bonsal, Richard I., Joshua L. Baily & Co., Inc.
27. Bridges, John F., First Investment Annuity Co. of America
28. Brown, Bart A., Jr., Dinsmore, Shohl, Coates & Deupree
29. Brown, Dorothy Q., New England Pension Services, Inc.
30. Broxterman, Wilfred F., Credit Union National Association, Inc.
31. Brunke, Kenneth E., Jr., President, Brunke & Co., Chicago, Ill.
32. Butler, Paul F., State Street Bank & Trust Co.
33. Calvin, Donald L., New York Stock Exchange
34. Cardon, John A., Lee, Toomey & Kent
35. Carpenter, Carlton L., Jr., M.D.
36. Carr, Richard R., Lynch, Lynch & Carr
37. Carroll, Dale S., Capital Review Corp.
38. Case, Raymond A., M.D.
39. Casey, Elizabeth M., Marsh & McLennan, Inc.
40. Casey, Louie C., Jr., State Bank of Jacksonville (Fla.)

41. Chapman, Wayne E., Cravath, Swaine & Moore
42. Clark, Harold, Peat, Marwick, Mitchel & Co.
43. Cohen, Edwin S., Covington & Burling
44. Cohen, Sheldon S., American Bar Association
45. Collie, Marvin K., Vinson, Elkins, Searls, Connally & Smith
46. Connors, John A., Kwasha Lipton, Inc.
47. Cookenbach, John M., American Bankers Association
48. Cooper, Henry T., Employee Benefit Plans, Inc.
49. Cooper, J. W., Corporate Fiduciaries Association of Illinois
50. Corporate Fiduciaries Association of Illinois, Employee Trusts Committee
51. Covey, Richard B., Carter, Ledyard and Milburn
52. Crim, E. T., M.D., Greenville Medical & Surgical Clinic
53. Cummings, Frank, Gall, Lane, Powell & Kilcullen
54. Curll, Daniel B., Day & Zimmermann Consulting Services
55. Curtis, James A., Milliman & Robertson, Inc., Actuaries
56. Dean, Thomas R., Dean's Custom Pensions, Inc.
57. Derlacki, Eugene L., M.D.
58. DeWind, Adrian W., Paul, Weiss, Rifkind, Wharton & Garrison
59. Didden, George A., Jr., National Capital Bank of Washington
60. Di Placido, Frank, D.D.S.
61. Disch, Aloysius J., Pension Associates, Inc.
62. Disney, Walter, Esq., Bundschu, Bailey & Disney
63. Dreher, William A., William A. Dreher & Associates, Inc.
64. Duncan, Carl I., Carl I. Duncan & Associates
65. Eichenbaum, E. Chas., Arkansas Bar Association
66. Elmendorf, Thomas, M.D., California Medical Association
67. Evans, W. F., W. F. Evans & Associates
68. Fellers, William W., Wyatt Co.
69. Fersko, Alfred, Fersko, Wasilewski & Co.

70. Fineberg, Henry I., M.D., Medical Society of the State of New York
71. Fisher, John W., Towers, Perrin, Forster, and Crosby, Inc.
72. Fisher, Merle R., Bank of America National Trust & Savings Association
73. Ford, Eugene W., Union Bank
74. Fortuin, Henry J. L., Jr., Marsh & McLennan, Inc.
75. Freeman, Gaylord, First National Bank of Chicago
76. Frend, Edward H., Edward H. Friend & Co.
77. Friedes, Peter E., Hewitt Associates
78. Friedman, Jerome P., Bailey, Moore & Glazer
79. Frimet, Gilbert M., Frimet, Goren & Bellammy
80. Giannini, Dr. J. P.
81. Gillette, Robert J., Aetna Capital Management, Inc.
82. Gilreath, James R., Dobson & Dobson
83. Gilsdorf, Lawrence J., Trust Consultants, Inc.
84. Ginsburg, Martin D., Weil, Gotshal & Manges
85. Glasmann, Jay W., Ivins, Phillips & Barker
86. Goddard, John, Knight & Ferry
87. Goldman, Kenneth A., Irell & Manella
88. Goldstein, Gerald, Advance Retirement Systems Corp.
89. Goodman, R. D., M.D.
90. Gould, Morris, Pension Counsellors, Inc.
91. Grant, Richard V., Medical Group Management Association
92. Graziano, Frank J., Crompton & Knowles Corp.
93. Griffes, Ernest J. E., American Society for Personnel Administration Members
94. Griswold, Bruce, American Bar Association
95. Grobe, Charles S., Grobe, Reinstein & Katz
96. Guntermann, Anthony, Guntermann, Johnston, Ball & Thompson
97. Hambleton, C. J., Harris Trust & Savings Bank
98. Hand, William W., American Society of Pension Actuaries
99. Hargrave, Alexander D., Lincoln First Bank of Rochester
100. Harman, Stetson B., The American Bankers Association

101. Hart, N. Berne, United Bank of Denver
102. Hartman, Willard, Wyatt Co.
103. Haymes, Steven, P. Ballantine & Sons, Investors Funding Corp.
104. Hazlehurst, Blackburn, H. Hazlehurst & Associates, Inc.
105. Helganz, Arthur J., American Institute of Certified Public Accountants
106. Henning, Charles J., National Bank of Sarasota
107. Hill, Robert S., Gary, Geyer, Hill & Nadell, Inc.
108. Hinchman, William R., Jr., Chase Manhattan Bank
109. Hodgson, Charles E., Corporate Benefit Planners, Inc.
110. Homola, Benjamin, Member, Employees Trust Committee, Corporate Fiduciaries Association of Illinois
111. Hosinski, David A., St. Joseph Bank & Trust Co.
112. Howard, Ernest B., M.D., American Medical Association
113. Hubbard, R. H., Council on Employee Benefits
114. Huge, Harry Esq., Arnold & Porter
115. Isler, Robert F., Oregon Society of Certified Public Accountants
116. Isom, Kelly W., Capital Exchange Corp.
117. Jackson, Paul H., Wyatt Co.
118. Jemas, Nick, Jockeys' Guild, Inc.
119. Jenks, Thomas E., Lee, Toomey & Kent
120. Jones, Edwin M., Clay, Gold, Climanco & Kramer
121. Kahn, James, Pension Planning Co.
122. Kaiser Foundation Health Plan, Inc.
123. Kelly, W. Thomas, First Investment Annuity Co. of America
124. Kelso, Louis O., Bangert & Co.
125. Kent, Edgar F., Connecticut Bank & Trust Co.
126. Kerr, Ben J., Jr., Mercantile National Bank
127. Kesner, John W., California Bankers Association
128. Keydel, Frederick R., Joslyn & Keydel
129. Klint, Walter E., Council on Employee Benefits
130. Klocker, Tom, Tom Klocker & Associates
131. Klostermeier, Walter R., First National Bank in St. Louis

132. Kull, Ronald L., Idaho State Bar Board of Commissioners
133. Kuller, Frank E., M.D.
134. Kurtz, Jerome, Wolf, Block, Schorr & Solis-Cohen
135. LaChapelle, George R., Credit Union National Association, Inc.
136. Lackman, William F., American Bankers Association
137. Lamberton, Ian K., Financial Executives Institute
138. Lamon, Harry V., Jr., Henkel & Lamon
139. Layton, LeRoy, American Institute of Certified Public Accountants
140. Lazara, Joseph H., Brent, Prince & Beck
141. Leo, Mario, Towers, Perrin, Forster & Crosby, Inc.
142. Lewis, James B., Paul, Weiss, Rifkind, Wharton & Garrison
143. Lidstone, Herrick K., Battle, Fowler, Stokes & Kheel
144. Limbert, Herbert, Peat, Marwick, Mitchel & Co.
145. Lindquist, John, Profit Sharing Council of America
146. Lingua, George M., First National City Bank
147. Lynch, Hilary G., Lynch, Lynch & Carr
148. Lyons, Robert, Esq., Spencer, Fane, Britt & Browne
149. MacDougall, John A., Jr., Edward H. Friend & Co.
150. Maer, Claude M., Jr., Holland & Hart
151. Maier, Kenneth J., M.D.
152. Maloyan, Richard, Maloyan Associates
153. Mandler, James E., Corporate Fiduciaries Association of Illinois
154. Maressa, Vincent A., Medical Society of New Jersey
155. Martin E. Segal Co.
156. McCabe, George, Consolidated Pension Consultants, Inc.
157. McFarland, David W., Overlake Internal Medicine Associates
158. McGinn, Daniel F., Transamerica Consultants Inc.
159. McKay, Neil, First National Bank of Chicago
160. McMillan, A. P., Jr., Insurance Analytical Service, Inc.
161. Michigan Credit Union League

162. Midkiff, Robert R., American Trust Co. of Hawaii, Inc. Profit Sharing Council of America, Hawaii Chapter
163. Miller, Morton D., American Academy of Actuaries
164. Mills, Robert P., R. P. Mills Associates, Inc.
165. Morris, James L., E. F. White & Associates
166. Morrison, Thomas L., M.D.
167. Mosiman, Morton C., Deferred Compensation Administrators, Inc.
168. Mudge, John T., First National Bank
169. Mulhern, Joseph P., McDermott, Will & Emery
170. Murdoch, Converse, Murdoch, Longobardi, Schwartz & Walsh
171. Myers, Robert J., Society of Actuaries
172. National League of Insured Savings Associations
173. Nelson, J. Thomas, Household Finance Corp.
174. Nolan, John S., Ivins, Phillips & Baker
175. Nolan, John S., Miller & Chevalier
176. O'Regan, Thomas J., Jr., Chicago Bar Association
177. Oliver, Sergio M., First Guaranty Bank
178. Paine, Thomas H., Council on Employee Benefits; Hewitt Associates
179. Paul, Robert D., Martin E. Segal Co.
180. Pickard, Henry A., Pickard, Inc.
181. Pickering, Robert H., Robert H. Pickering & Associates, Ltd.
182. Pittard, M. D., M.D.
183. Poston, Elizabeth C., Edward H. Friend & Co.
184. Potts, Ramsay D., Investment Counsel Association of America
185. Powell, George V., Lane, Powell, Moss & Miller
186. Profit Sharing Council of America
187. Rankin, B. Courtney, National Bank of Detroit
188. Retan, Ted H., American Actuaries, Inc.
189. Retirement Equities Fund
190. Reynolds, Joseph H., Sr., J. H. Reynolds & Associates
191. Reynolds, Susan, E., J. H. Reynolds & Associates
192. Rinfret, Dr. Pierre A., Rinfret-Boston Associates, New York, N.Y.

193. Robbins, Paul H., National Society of Professional Engineers
194. Robinson, R. W., R. W. Robinson & Associates, Co.
195. Rockwell, A. G., M.D.
196. Root, Charles D., Jr., Towers, Perrin, Forster & Crosby, Inc.
197. Rose, Kenneth R., Aid Associates, Inc.
198. Rosen, Irving, National Society of Public Accountants
199. Ross, Stanford G., Caplin & Drysdale
200. Sacher, Samuel M., Employers Planning Corp. of America
201. Sachs, Dr. J. M.
202. Sanden, B. Kenneth, Price Waterhouse & Co.
203. Saporito, Louis A., D.D.S., American Dental Association
204. Savage, Carroll, Ivins, Phillips & Baker
205. Savitz, Samuel J., American Society of Pension Actuaries, Solaman G. Lippman, counsel
206. Scherer, Robert A., D.D.S.
207. Schirra, William A., Financial Futures, Inc.
208. Schug, Otto F., Indiana State Bar Association
209. Seaman, R. V., American Hospital Corp.
210. Searcy, James, St. Joseph Valley Bank
211. Seattle National Bank
212. Seibert, Fred E., Bank of America, The American Bankers Association
213. Sellers, Wallace O., Merrill, Lynch, Pierce, Fenner & Smith, Inc.
214. Sewell, Julian D., National Society of Public Accountants
215. Shadur, Robert C., Shadur, LaVine & Associates
216. Shaeffer, Charles W., T. Rowe Price Associates, Inc.
217. Shambaugh, George E., Jr., M.D.
218. Sherman, I. J., Jr., M.D.
219. Simonetti, Gilbert, Jr., American Institute of Certified Public Accountants
220. Skinner, Robert G., American Institute of Certified Public Accountants
221. Smith, Carl, Jr., Michigan State Bar

222. Smith, Quentin I., Jr., Towers, Perrin, Forster & Crosby
223. Smithson, Lowell, Esq., Spencer, Fane, Britt & Browne
224. Snell, Willis B., Sutherland, Asbill & Brennan
225. Steider, Robert E., D.O.
226. Steiner, William K., F.S.A., the Zischke Organization, Inc.
227. Stevens, William K., First National Bank of Chicago
228. Sticksel, J. C., Employee Plans Management Co.
229. Sullivan, Frank, Frank Sullivan Associates
230. Summa, D. J., Arthur Young & Co.
231. Swartz, Harold T., Coopers & Lybrand
232. Swick, George B., American Academy of Actuaries; George B. Buck Consulting Actuaries, Inc.
233. Tarver, Norman H., Equity Market Research
234. Thielbar, Henry B., Member of the Board of Governors of the Investment Counsel Association of America
235. Tolley, Russell M., National Association of Professional Administrators
236. Ture, Dr. Norman B.
237. United States Savings & Loan League
238. Upson, Lauren, California Bankers Association Committee on employee benefit trusts
239. Vines, Johnnie R., Luffey, Little & Co.
240. Vogel, Eugene L., Association of the Bar of the City of New York
241. Wailes, Mary G., California State Bar
242. Weber, Henry J., Stone, Young & Co.
243. Weber, Philip H., Weber Financial, Inc.
244. Weiss, Stephen P., Fox, Rothschild, O'Brien & Frankel
245. Wharton, Dean W., Financial Planning Associates
246. Whisenand, Fred E., McIntee & Whisenand
247. Wille, Frank, Superintendent of Banks of the State of New York
248. Winger, Ralph O., New York State Bar Association
249. Woodbury, Wallace R., Woodbury, Wunderli & Sorensen
250. Worthy, K. Martin, American Bar Association
251. Wyloge, Elliott I., M.D.

252. York, E. Malcom, Paul Inman Associates, Inc.
253. Young, Thomas, Stone, Young & Co.
254. Zerkle, Thomas E., Professional Management Associates, Inc.
255. Zink, Philip G., Jr., Pennsylvania Institute of Certified Public Accountants

Representatives of Employers

1. Adair, Doyle, Aber Co., Inc.
2. Adamy, Clarence G., National Association of Food Chains
3. Adduci, V. J., Electronic Industries Association
4. Aders, Robert A., Kroger Co.
5. Air Line Pilots Association International
6. Air Transport Association
7. Albright, Robert A., National Association of Manufacturers
8. Allen, George, Baldwin-Lima-Hamilton, Philadelphia, Pa.
9. Ambrogi, William P., Witmoyer Laboratories, Inc.
10. American Nurses' Association
11. American Telephone & Telegraph Co.
12. American Textile Manufacturers Institute
13. Ammond, Harold J., Political Action Committee for Engineers and Scientists
14. Ancypowic, James, P. Ballantine & Sons
15. Anderson, Kenneth G., Celanese Corp.
16. Anspach, Herbert K., Whirlpool Corp.
17. Associated Builders and Contractors, Inc.
18. Associated General Contractors of America, Inc.
19. Association of American Railroads
20. Auer, David L., Wyo-Ben Products, Inc.
21. B. F. Goodrich Co.
22. Backe, Richard, Institute of Electrical & Electronics Engineers
23. Bagge, Carl E., National Coal Association
24. Barnes, Earle B., Dow Chemical

25. Barnes, William H., International Home Furnishings Representatives Association
26. Baskin, Charles G., Golf Course Superintendents Association of America
27. Bauer, L. R., Allis-Chalmers Corp.
28. Baynes, R. C., Revere Copper & Brass, Inc.
29. Behrens, Richard J., Zenith Radio Distributing Corp.
30. Bell, William C., Bill Bell, Inc.
31. Bergquist, Don S., Lincoln (Nebr.) Equipment Co.
32. Bertrand, C. E., Reading Co.
33. Biaggini, B. F., Southern Pacific Co.
34. Bigelow, K. K., Martin Marietta Corp.
35. Bilger, Raymond P., Sears, Roebuck & Co.
36. Binns, James H., Armstrong Cork Co.
37. Birdsong, Fred, Blue Bell, Inc.
38. Bittenbender, R. C., Container Corp. of America
39. Blair, William, Ingram-Richardson Manufacturing Co.
40. Blaker, A.H., The Boeing Co.
41. Bland, Willard, Corporate Benefits of Genesco, Inc.
42. Blomquist, A. T., Rohm & Haas Tennessee, Inc.
43. Boekenheide, Russell W., Kendall Co.
44. Boise Cascade Corp.
45. Bradshaw, William J., Corning Glass Works
46. Brankin, Edward, Scovill Manufacturing Co.
47. Bret, William N., Jr., A. S. Hansen, Inc.
48. Bruton, Frank X., Lima-Hamilton
49. Buckley, Robert J., Allegheny Ludlum Industries, Inc.
50. Burns, William G., American Telephone & Telegraph Co.
51. Butler, J. Godfrey, D.C. Transit System, Inc.
52. Cahill, Joseph, Salesmen's Committee, Inc.
53. Cairns, Robert W., American Chemical Society
54. Caldwell, Robert J., California Products Corp.
55. Cameron, James, Winn-Dixie Stores, Inc.
56. Campbell, Alfred, Baldwin-Lima-Hamilton
57. Christrup, G. K., Xerox Corp.
58. Clark, Albert, American Zinc Co.
59. Clark, Howard, Selmer Division, Magnavox Corp.
60. Cole, R. B., E. I. du Pont de Nemours & Co.

61. Cole, Samuel, Benson Manufacturing Co.
62. Columbia Gas System Service Corp.
63. Compton, H. W., National Cash Register Co.
64. Condon, Justin J., Rexnord, Inc.
65. Congleton, Ivan, Associated Oregon Industries
66. Cort, S. S., Bethlehem Steel Corp.
67. Courtney, Edward, Baltimore Building & Construction Trades
68. Crane, Robert D., Native American Economic Development Corp.
69. Crane, W. J., Uniroyal, Inc.
70. Crawford, W. Donham, Edison Electric Institute
71. Croft, Edward S., Jr., Robinson-Humphrey Co., Inc.
72. Crook, Marcus, Benson Manufacturing Co.
73. Crump, Frank, Columbus Malleable Inc.
74. Cummings, Frankin, American Society of Civil Engineers
75. Cummings, R. W., Industrial Fabricating Corp.
76. Curran, R. M., Rochester Telephone Corp.
77. Darrow, John F., American Paper Institute
78. Daume, W. B., Monsanto Co.
79. Davis, Donald W., Stanley Works
80. Davis, Ovid, Coca-Cola Co.
81. Deal, G. L., Timken Co.
82. Dee, Joseph A., Brooks Cameras, Inc.
83. Dempsey, Paul F., Lima-Hamilton
84. Denny, Charles R., RCA, Inc.
85. Dewey, W. F., Blue Bell, Inc.
86. Dillsaver, R. D., Cities Service Co.
87. Ditzel, J. E., TV Travel, Inc.
88. Dixon, G. E., Blue Bell, Inc.
89. Donahue, Gerald A., Associated Industries of New York State, Inc.
90. Doss, Edward W., Southern Resin & Chemical Co.
91. Doyle, Paul K., Union Oil Co. of California
92. Doyle, Robert, National Society of Professional Engineers
93. Dunnigan, Frank J., Prentice-Hall, Inc.

94. Dwyer, Gilbert E., Kennecott Copper Corp.
95. Eager, David, Gerber C., Kaiser Industries
96. Eckermann, Gerald C., Kaiser Industries
97. Edmonston, C. H., Riegel Textile Corp.
98. Edney, Fred R., Reynolds Metals Co.
99. Ehrle, Raymond A., Teledyne Economic Development Co.
100. Elder, Harmon L., Southern States Industrial Council
101. Elliott, A. B., TVE Sale, Inc.
102. English, Wayne G., Hallmark Cards, Inc.
103. Evans, W. Frank, Red Kap Industries
104. Ewell, James M., Procter & Gamble Co.
105. Eyer, Elmer, CTS Corp.
106. Fallon, Walter A., Eastman Kodak Co.
107. Farrar, Claude, American Textile Manufacturers Institute, Inc.
108. Federated Department Stores, Inc.
109. Fenzi, Warren E., Phelps Dodge Corp.
110. Ferebee, S. Scott, Jr., American Institute of Architects
111. Fernstrum, Richard F., MP Pumps, Inc.
112. Flanagan, Eugene J. T., Philip Morris, Inc.
113. Fletcher, N. Herndon, Uniroyal, Inc.
114. Foltz, Edwin J., Campbell Soup Co.
115. Forbes, E. C., Worthington Corp.
116. Forster, Homer W., PFP Corp.
117. Fosner, S. Harvey, Roosevelt Raceway
118. Fox, Arthur L., II, Professional Drivers Council for Safety and Health
119. Fox, Lester, Studebaker Worthington Corp.
120. Franklin, W. H., Caterpillar Tractor Co.
121. French, John A., Carrier Corp.
122. Frisbee, Don C., Pacific Power & Light Co.
123. Fuqua, Benh H., Florida Power & Light Co.
124. Furlong, Russell, Dealers Advisory Corp.
125. Furman, M. D., ATO Inc.
126. Gassett, James, Benson Manufacturing Co.
127. Gauss, J. H., General Electric Co.
128. Gebbie, W. G., DMG Co., Inc.
129. Gerstenberg, R. C., General Motors Corp.

130. Gibbons, C. Thomas, Horn & Hardart Baking Co.
131. Giesecke, Raymond H., McGraw-Edison & Co.
132. Glick, M. H., Caterpillar Tractor Co.
133. Gocke, Robert E., Greyhound Corp.
134. Gojmerac, John, Haws Refractories Co.
135. Gordon, Thurl, Bastian-Morley Corp.
136. Gore, Philip Larner, Security Storage Co. of Washington, D.C.
137. Gray, Harry J., United Aircraft Corp.
138. Greenberg, Maurice R., American International Group, Inc.
139. Greene, W. A., Barber-Greene Co.
140. Gregory, V. L., Rohm & Haas Co.
141. Griffin, W. L. Hadley, Brown Group, Inc.
142. Grimes, Leon, Horn & Hardart Baking Co.
143. Grout, Richard A., Fruehauf Corp.
144. Grunewald, R. J., Morton-Norwich Products, Inc.
145. Gusman, Samuel, Warren-Teed Pharmaceuticals
146. Gutoff, Reuben, General Electric Co.
147. Gwartney, Michael, Employee Benefits for Boise Cascade Corp.
148. Hall, Jim, Woodward Governor Co.
149. Halliwell, Paul, Babb, Inc.
150. Hallock, Edward C., Construction Specialties, Inc.
151. Halton, Jr., Ted, Halton Tractor Co.
152. Hardy, Eugene J., National Association of Manufacturers
153. Harr, Karl G., Jr., Aerospace Industries Association of America, Inc.
154. Harris, Varnie, Horn & Hardart Baking Co.
155. Harrison, William, Benson Manufacturing Co.
156. Hartfelder, Herbert E., Southland Corp.
157. Haupt, J. Dudley, St. Regis Paper Co.
158. Hawkes, Sidney G., Mead Corp.
159. Hayes, J.D., Hercules, Inc.
160. Hedrick, Frank E., Beech Aircraft Corp.
161. Henkel, Arnold D., Henkel-Swanson Co.
162. Henson, Norwood J., Horn & Hardart Baking Co.
163. Henze, Robert E., Dr., American Chemical Society

164. Heyke, John E., Jr., Brooklyn Union Gas Co.
165. Hillman, Barbara, American Zinc Co.
166. Hirschberg, T. V., Sperry Rand Corp.
167. Hoddick, Frank, Michigan Bell Telephone Co.
168. Hoey, Norman, P. Ballantine & Sons
169. Honkamp, Richard C., Hydrite Chemical Co.
170. Hornbuckle, Charles T., City Coach Lines, Inc.
171. Horney, W. G., Owens-Illinois
172. Houck, Kenneth L., Bethlehem Steel Corp.
173. Howarth, Thomas, United States Independent Telephone Association
174. Hudock, Arthur W., Scott Paper Co.
175. Hudson, Jay S., ESB, Inc.
176. Huselton, B. C., Armco Steel Corp.
177. Hutchinson, Robert, Fruehauf Corp.
178. Jacobs, John, Schaefer Corp.
179. Janos, Alfred, Nadco, Inc.
180. Jarman, F. M., Genesco, Inc.
181. Jensen, Robert E., IU International
182. Johnson, E. W., All Steel, Inc.
183. Jones, Frank P., Jr., Aluminum Co. of America, Inc.
184. Jones, Horace C., Burlington Industries, Inc.
185. Jones, Kenneth, Horn & Hardart Baking Co.
186. Jones, Paul A., Kimberly-Clark Corp.
187. Jones, Reginald H., General Electric Co.
188. Jordan, William B., Kraftco Corp.
189. Kahgan, Jack J., Kahgan Sales Corp.
190. Kaiser, Paul R., Tasty Baking Co.
191. Keegan, J. R., Armstrong Rubber Co.
192. Keldon, E. J., Chicago Bridge & Iron Co.
193. Kellogg, Martin N., Tennant Co.
194. Kenney, W. W., Northern Natural Gas Co.
195. Kent, G. P., Western Union
196. King, Stanley L., Jr., American Telephone & Telegraph Co.
197. Kinney, Eugene M., Zenith Radio Corp.
198. Kinney, Samuel M., Jr., Union Camp Corp.
199. Kinsey, Kenneth, Anaconda Brass
200. Kinzey, Jane, Taulman Co.

201. Kirby, W. J., FMC Corp.
202. Knapp, G. W., General Electric Co.
203. Kneen, H. P., Jr., International Business Machines Corp.
204. Knepper, Meredith, Gar Wood Division
205. Knoell, W. H., Cyclops Corp.
206. Kohler, Paul W., Howard Swink Advertising
207. Korzenik, Harold, United Knitwear Manufacturers League
208. Kostrab, J. A., International Telephone & Telegraph Co.
209. Krappman, A. J., Jr., O. K. Earl Corp.
210. Kropf, Robert G., Whittaker Corp.
211. Krzykoski, Walter, Uniroyal
212. Kurshan, Herbert S., Halmode Apparel, Inc.
213. Kwek, Mrs. Iris, Anaconda Co.
214. Lapoe, W. G., Safeco Insurance Co.
215. Largay, Vincent, Anchor Fasteners, Inc.
216. Larson, John, Benson Manufacturing Co.
217. Law, William J., Maverick, Division of Blue Bell, Inc.
218. Lawrence, George H., American Gas Association
219. Laxson, R. W., Honeywell Inc.
220. Layton, Joseph R., Sun Oil Co.
221. Lazarus, Ralph, Federated Department Stores, Inc.
222. Lefler, Helen C., S. S. Kresge Co.
223. LeMatty, R.S., Blue Bell, Inc.
224. Levinthal, Robert M., Council of Engineers and Scientists Organizations
225. Liebenson, Herbert, National Small Business Association
226. Lincoln, John Sidney, Baldwin-Lima-Hamilton
227. Lippman, M. John, CPI Group, Inc.
228. Lippman, S. G., Political Action Committee for Engineers & Scientists
229. Litchko, Thomas, Baldwin-Lima-Hamilton
230. Little, Stanley M., Jr., Boeing Co.
231. Locke, Edwin A., Jr., American Paper Institute
232. Logsdon, Donald, Gar Wood Division
233. Lowe, Ethel, Horn & Hardart Baking Co.

234. Lovett, James F., Westinghouse Electric Corp.
235. Lumb, H. C., National Association of Manufacturers
236. Lutz, R. F., Lady Wrangler
237. Lyons, Raymond M., Fruehauf Corp.
238. Macbeth, William E., Macbeth Hardwood Co.
239. MacDonald, Robert C., Young Radiator Co.
240. MacMillan, Clifford M., Studebaker Corp.
241. Malone, William R., General Telephone & Electronics Corp.
242. Mann, Forbes, LTV Corp.
243. Mann, L. K., Blue Bell, Inc.
244. Mannion, James P., Jr., Falstaff Brewing Corp.
245. Mantler, Marshall J., Bureau of Salemen's National Associations
246. March, C. R., Harsco Corp.
247. Margly, V. R., Imperial-Eastman Corp.
248. Markley, R. W., Jr., Ford Motor Co.
249. Martin, John H., Litton Industries, Inc.
250. Marvin, R. M., Precision Castparts Corp.
251. Matthews, Bruce, Montgomery Ward
252. Matthews, Bruce, National Retail Merchants Association
253. Maxey, Lon J., General Sign Co.
254. Maynard, J. H., Carnation Co.
255. McCarthy, Edmund, Mallinckrodt Chemical Works
256. McClellan, C. E., Jewel Cos., Inc.
257. McCormick, Deane E., Jr., Litton Industries, Inc.
258. McDermott, Robert F., United Services Automobile Association
259. McGovern, John B., Nabisco, Inc.
260. McGrath, John C., P. Ballantine & Sons
261. McKinley, Jack, The Prototype Planner
262. McLachlan, Bert H., Nichols Industries
263. McLean, John C., Continental Oil Co.
264. McMaster, John, Baldwin-Lima-Hamilton
265. McMeekan, Dorothy B., Riverhead (N.Y.), Supreme Court Law Library
266. Meese, William G., Detroit Edison
267. Mellon, E. R., Washington Gas Light Co.

268. Mendlein, James C., Griscom-Russell
269. Meyer, William E., Broadway Hale Stores
270. Miles Laboratories, Inc., Washington, D.C.
271. Miller, Richard B., Bankers Magazine
272. Mills, Daniel Quinn, Construction Industry Stabilization Committee
273. Mitchell, H. V., Gulf States Paper Corp.
274. Mitchell, John C., Rohm & Haas
275. Mobil Oil Corp.
276. Mooney, J.B., Mooney Chemicals, Inc.
277. Moore, John, Employer Relations, Scovill Manufacturing Co.
278. Moore, R. P., Liggett & Myers, Inc.
279. Morgan, C. R., National Gypsum Co.
280. Morgan, George B., Texas Metal Works, Inc.
281. Morris, E.A., Blue Bell, Inc.
282. Mottin, Walter, American Zinc Co.
283. Mueller, E. C., Sauquoit Fibers Co.
284. Munroe, Douglas, Anaconda Co.
285. Murray, Kenneth W., General Electric Co.
286. Myers, Charles F., Jr., Burlington Industries, Inc.
287. Naglieri, Thomas, White Motor Co.
288. National Association for Professional Associations & Corporations
289. National Automobile Dealers Association
290. Naumann, William E., M. M. Sundt Construction Co.
291. Nethercott, J. W., Proctor & Gamble Co.
292. Neufeld, Don H., Copolymer Rubber & Chemical Corp.
293. Newman, L. T., Grede Foundries, Inc.
294. Niagara Mohawk Power Corp.
295. Niedwiecke, Joseph, White Motor Co.
296. Nyhart, Eldon H., Howard E. Nyhart Co.
297. O'Connor, Lawrence L., Sears, Roebuck & Co.
298. Oppenheimer, Jerry L., Brunswick Corp.
299. Owen, Ray, Owen-News Direction
300. Owens, Phillip R., National Society of Professional Engineers
301. Page, George B., Page Milk Co.

302. Palmer, George A., Jr., Joseph Horne Co.
303. Palmer, Gorden, Minneapolis Moline Co.
304. Pasternak, Harry J., Park Electrochemical Corp.
305. Pellett, Thomas R., Pet, Inc.
306. Perkins, J. Carter, Shell Oil Co.
307. Perkins, Kenneth, Simpson Lee Paper Co.
308. Phillips, Herbert, White Motor Co.
309. Pimenta, John, Multinational Corporate Development, Inc.
310. Pines, Howard, P. Ballantine & Sons
311. Pirtle, John C., General Electric Co.
312. Poe, Foster D., Automatic Springs Products Corp.
313. Pope, N., Revere Copper & Brass, Inc.
314. Porter, Henry H., Jr., General Mills
315. Potash, Arnold, P. Ballantine & Sons
316. Powers, O. E., Turbodyne Corp.
317. Priestley, G. G., Geoffrey Imports, Inc.
318. Prince, Gregory S., Association of American Railroads
319. Provost, D. E., Stearns-Roger Corp.
320. Quigley, Stephen T., American Chemical Society
321. Raleigh, T. J., Dresser Industries, Inc.
322. Rasmussen, Edward, Minneapolis Moline Co.
323. Rayner, William W., MacMillan, Inc.
324. Raytheon Co., Lexington, Mass.
325. Reeve, William L., Chemplex Co.
326. Reilly, Peter C., Reilly Tar & Chemical Corp.
327. Remmers, Edward G., American Institute of Chemical Engineers
328. Richardson, H. B., National Gypsum Co.
329. Rietz, Robert A., A. O. Smith Corp.
330. Riley, R. A., Firestone Tire & Rubber Co.
331. Robbins, Paul H., National Society of Professional Engineers
332. Robinson, William, Columbus Malleable, Inc.
333. Robison, H. LeRoy, Gar Wood Division
334. Roby, R. K., American Cyanamid Co.
335. Rodriguez, Roy, American Zinc Co.
336. Roloff, C. A., Pillar Corp.
337. Rooney, Francis C., Jr., Melville Shoe Corp.

338. Rosamilia, Arthur, P. Ballantine & Sons.
339. Rosinki, Stephen, Baldwin-Lima-Hamilton
340. Rosinski, S. J., Rohr Industries, Inc.
341. Rossoff, Arthur L., Amer. Inst. of Aero. and Astronautics
342. Runyan, W. P., Top Value Ent., Inc.
343. Ryder, James A., Ryder System, Inc.
344. Sagan, John, Ford Motor Co.
345. Sagendorf, Raymond, P. Ballantine & Sons.
346. Salmen, Edward J., Dominion Electric Co.
347. Sauer, E. T., Rohm & Haas Kentucky, Inc.
348. Sawyer, John, Universal Cyclops Steel Corp.
349. Schaltenbrand, L. L., Alton & Southern Railway Co.
350. Schauer, Paul D., Gates Rubber Co.
351. Schindel, Philip W., Association of General Merchandise Chains
352. Schoke, James A., Voltarc Tubes, Inc.
353. Schroeder, Harold H., American Telephone & Telegraph Co.
354. Schultz, John H., J. M. Schultz Seed Co.
355. Sealy, Albert H., Mead Corp.
356. Semple, Cecil S., General Electric Co.
357. Severance, H. L., Standard Oil Co. of California
358. Shaffer, W. F., Oscar Mayer & Co.
359. Shand, Dominick, Minneapolis Moline Co.
360. Sheehan, Jack, United Steelworkers of America, accompanied by Bernard Greenberg, Pittsburgh Department of Pensions and Insurance, and Murray Latimer, Consultant
361. Shepard, B. G., Rohm & Haas
362. Shershin, Michael, Scovill Manufacturing Co.
363. Shidler, Alan B., Universal Oil Products Co.
364. Sielaff, Max, Green Bay Packaging, Inc.
365. Siena, John, W. R. Grace & Co.
366. Simons, John F., Continental Can Co., Inc.
367. Smith, C. H., Jr., Sifco Industries, Inc.
368. Smith, Clay, American Zinc Co.
369. Smith, Dale, Plumbing and Pipefitting Industry
370. Smith, Louis, Minneapolis Moline Co.

371. Smith, R. J., Smith Chevrolet Center
372. Sorenson, Allen H., S. H. Kress & Co.
373. Southern States Industrial Council
374. Spahn, William H., New York Hotel Trades Council and Hotel Association of New York City, Inc.
375. Starbuck, Phil, Singer Controls Co. of America
376. Steckel, R. G., Powers Regulator Co.
377. Steil, G. E., Harrington & King Perforating Co., Inc.
378. Stern, E. J., Seabord Industries, Inc.
379. Stevenson, A. Robert, S. S. Kresge Co.
380. Stewart, Edith, Horn & Hardart Baking Co.
381. Stinson, George A., National Steel Corp.
382. Stodolka, Joseph, Minneapolis Moline Co.
383. Stone, Dale D., Sun Oil Co
384. Stoops, Wilbur C., Dominion Electric Co.
385. Strichartz, Morris Harvey, American Radio Association
386. Strichman, George A., Colt Industries, Inc.
387. Suppes, R. W., Ideal Basic Industries, Inc.
388. Talbot, Uber, Baldwin-Lima-Hamilton
389. Taylor, Walter C., Jr., Eli Lilly Co.
390. Tharpe, Jack M., Standard Oil Co. (Indiana)
391. The Associated General Contractors of America
392. Thomas, Mortimer B., R. G. Corp.
393. Thomas, Peter, Huck Manufacturing Co.
394. Thomas, W. R., Phillips Petroleum Co.
395. Thompson, Craig, White Motor Co.
396. Thompson, John P., Southland Corp.
397. Tillinghast & Co.
398. Timney, Gilbert, Griscom-Russell
399. Torstenson, John A., Fastner Corp.
400. Tritschler, James R., White Motor Co.
401. Trout, James, American Zinc Co.
402. Troy, Thomas P., Combustion Engineering, Inc.
403. Turchan, T. P., American Cyanamid Co.
404. Twinney, Marc M., Jr., Ford Motor Co.
405. Valenty, Thomas G., Onan Corp.
406. Valko, N. G., Consolidated Biomedical Laboratories
407. Van Vliet, J. W., Great Atlantic & Pacific Tea Co., Inc.
408. Vermillion, Lee, Benson Manufacturing Co.

409. Vetter, E. O., Texas Instruments, Inc.
410. Walker Richard M., Walker Metallurgical Corp.
411. Wallace, Gordon, the Engineering Societies
412. Ware, Robert C., National Small Business Association
413. Warren, Paul G., Gunthorp-Warren Printing Co.
414. Waters, R., Reader's Digest Association
415. Wearly, W. L., Ingersoll-Rand Co.
416. Webb, Charles B., Sr., Alabama Metal Industries Corp.
417. Whaley, W. B., Graybar Electric Co., Inc.
418. Wheeler, William, Gar Wood Division
419. Whitaker, Jack F., Whitaker Cable Co.
420. Whitbread, Bernard J., Marsellus Casket Co.
421. Whitehead, D. F., Standard Register Co.
422. Whyte, William G., United States Steel Corp.
423. Wickman, Harvey, Minneapolis Moline Co.
424. Williams, James R., National Retail Merchants Association
425. Williford, Frederick L., National Federation of Independent Business
426. Willis, E. S., General Electric Co.
427. Wilson, John A., Diamond Shamrock Corp.
428. Wisely, Harold M., Eli Lilly & Co.
429. Withall, William E., Miner Enterprises, Inc.
430. Wood, Arthur, Sears, Roebuck and Co.
431. Wood, Curtis L., Rocky Mountain Motor Tariff Bureau.
432. Woolley, Jack, PPG Industries, Inc.
433. Worobetz, Joseph, P. Ballantine & Sons
434. Wright, Orrin B., Editorial Director, Mellus Newspapers
435. Young, Nelson J., PM Florida East Coast, Inc.
436. Zimmerman, Robert G., F. W. Woolworth Co.

Union Representatives

1. Abel, I. W., United Steelworkers of America
2. Bailey, James F., United Brotherhood of Carpenters & Joiners of America

3. Bainbridge, Richard, United Steelworkers of America
4. Beidler, Jack, United Auto Workers of America
5. Beirne, Joseph A., Communications Workers of America
6. Belardi, Joseph, Local Joint Board of Culinary Workers, Bartenders & Hotel, Motel, & Club Service Workers Union
7. Benzoni, Pete, United Steel Workers
8. Bernstein, Meyer, United Mine Workers of America
9. Biemiller, Andrew J., American Federation of Labor and Congress of Industrial Organizations; Department of Legislation, American Federation of Labor-Congress of Industrial Organizations
10. Bonadio, Frank, Building & Construction Trades Department (AFL-CIO)
11. Bond, Tony, District 15, United Steelworkers of America
12. Boyle, Thomas E., International Chemical Workers Union
13. Bricklayers, Masons & Plasterers International Union of America
14. Building & Construction Trades Department (AFL-CIO)
15. Burkholder, Thomas, Oil, Chemical and Atomic Workers International Union
16. Camarota, Luke, Local 478
17. Campbell, Kenneth, United Steelworkers of America
18. Cantor, Arnold, Research Department, American Federation of Labor-Congress of Industrial Organizations
19. Carlough, Edward J., Sheet Metal Workers Int'l Ass'n, AFL-CIO
20. Casstevens, Bill, United Auto Workers of America
21. Communications Workers of America
22. Cope, George, Local 1843, United Steelworkers
23. Crone, Philip, St. Joseph County UAW-CAP, council chairman
24. Curtin, Thomas, United Auto Workers
25. Daniel, Ed, Gar Wood Local 250
26. Davis, Thomas A., Jockeys' Guild, Inc.

27. Diamond, Louis H., Mechanical Contractors Association of America, Inc.
28. DiStefano, Joseph, International Union of District 50, ATW
29. Donoian, Henry A., Allied Industrial Workers of America
30. Edwards, Nelson Jack, United Auto Workers of America
31. Ehman, William H., United Steelworkers of America
32. Epstein, Albert S., International Association of Machinists & Aerospace Workers, AFL-CIO
33. Fagan, Thomas L., Local Union 249, General Teamsters, Chauffeurs & Helpers
34. Finkelstein, Murray, Retail Shoe Employees' Union, Local 1268
35. Fitzgerald, Albert J., United Electrical, Radio, & Machine Workers of America
36. Fox, H. Lawrence, International Brotherhood of Electrical Workers, Local No. 8
37. Georgine, Robert A., Building & Construction Trades Department (AFL-CIO)
38. Gertner, Mare, International Brotherhood of Electrical Workers, Local No. 8
39. Granite Cutters' International Association of America
40. Greathouse, Pat, United Auto Workers
41. Greenberg, Bernard, United Steelworkers of America
42. Griffin, Thomas, United Auto Workers
43. Hall, Paul, Seafarers International Union of North America (AFL-CIO)
44. Hammerle, Don, Local 1272, United Steelworkers of America
45. Hampson, Vivian, UAW Local 985
46. Holly, Milton R., Huron Forge Division, Local 174
47. Hubbard, Buckley, Jr., NALU Federal Law and Legislation Committee
48. Huge, Harry, Esq., Arnold & Porter, United Mine Workers of America

49. International Association of Heat & Frost Insulators & Asbestos Workers
50. International Association of Marble, Slate, & Stone Polishers, Rubbers & Sawyers, Tile Helpers & Finishers, Marble Setters Helpers, Marble & Mosaic & Terrazzo Workers Helpers
51. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers
52. International Brotherhood of Painters & Allied Trades
53. International Union of Elevator Constructors
54. International Union of Operating Engineers
55. Jeffrey, Francis, international representative of the Auto Workers
56. Jennings, Paul, International Union of Electrical, Radio and Machine Workers
57. Johnson, Gerald, Local 107
58. Johnson, Lewis J., Arkansas Farmers Union
59. Johnston, Edward R., International Union of Electrical, Radio & Machine Workers, AFL-CIO
60. Johnston, Robert, UAW, region 4, UAW Illinois CAP Council
61. Jorgenson, Jack, Teamsters Joint Council 32
62. Kabat, Emil, United Steelworkers of America
63. Keenan, Joseph D., International Brotherhood of Electrical Workers
64. Knecht, Louis, Communication Workers of America, AFL-CIO
65. Koban, Andrew J., United Steelworkers of America
66. Laborers' International Union of North America
67. Lengyel, Robert, American Radio Association, AFL-CIO
68. Lester, Harry E., Labor Education Coordinator, District 29, United Steelworkers of America
69. Lyons, John H., International Association of Bridge, Structural & Ornamental Iron Workers
70. Mahlum, Charles, Association of Western Pulp and Paper Workers; Weyerhaeuser Council, Association of Western Pulp & Paper Workers

71. Majerus, Ray, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
72. Marshall, John G., Teamsters Union, AFL-CIO
73. Martin, James B., New York City District Council of Carpenters, General Contractors Ass'n
74. Martinez, Philip, Teamsters Ranks United to Help Chicago
75. Martinez, Thomas, National Maritime Union
76. Marturo, Frank D., International Chemical Workers Union
77. Mazziotta, Thomas, New York City District Council of Carpenters
78. McCarrell, John M., President of Local 544, United Auto Workers of America
79. McCuddy, Edwin F., United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 819
80. Moore, Jack F., International Brotherhood of Electrical Workers, Local 453
81. Morgan, John, Connecticut Union of Telephone Workers
82. Nestor, John, local 12-B, Bakery and Confectionery Workers
83. O'Barto, Andrew, Local Union 12037 of District 50
84. Operative Plasterers' & Cement Masons' International Association
85. Phillips, Wendell, Bay Area Joint Council of Teamsters
86. Pillard, Charles H., International Brotherhood of Electrical Workers
87. Poulin, Claude, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
88. Raftery, S. Frank, International Brotherhood of Painters & Allied Trades, AFL-CIO
89. Rainero, David, International Union of the United Brewery Workers of America, Locals 22, 67, and 144
90. Rice, Edward, Teamsters Joint Council 64
91. Roe, David, Minnesota AFL-CIO
92. Rolnick, Louis, International Ladies' Garment Workers' Union, AFL-CIO

93. Santaguida, Frank, United Auto Workers
94. Schaefer, Marcellus, American Postal Workers Union
95. Schmitt, John W., Wisconsin State AFL-CIO
96. Seidman, Bert, AFL-CIO; Department of Social Security, American Federation of Labor-Congress of Industrial Organizations
97. Shapiro, Leon, National Marine Engineers Beneficial Association, AFL-CIO
98. Sheehan, John J., United Steelworkers of America
99. Sheet Metal Workers' International Association
100. Sheinkman, Jacob, Amalgamated Clothing Workers
101. Shy, Arthur, Greathouse, Agricultural Implement Department of the Auto Workers
102. Sipser, I. Philip, Brewery Workers Joint Local Executive Board
103. Smith, Roger D., Jockeys' Guild, Inc.
104. Solenberger, Willard, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW), AFL-CIO
105. Sorenson, Murray, Hopkins Office Workers Local No. 337
106. Stenson, Mrs. Joseph, United Mine Workers
107. Thomas, J. C., Member of the Chicago Truckdrivers Union, Independent
108. United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the United States and Canada
109. United Brotherhood of Carpenters & Joiners of America
110. United Slate, Tile & Composition Roofers, Damp & Waterproof Workers' Association
111. Vaagen, Martin, Independent Radionic Workers of America
112. Walstrom, Emmanuel, Local 1147
113. Wood, Wire & Metal Lathers' International Union
114. Woodcock, Leonard, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)
115. Wrenn, Donald, Greater Waterbury Labor Council, Connecticut State Labor Council, AFL-CIO

116. Wurf, Jerry, American Federation of State, County & Municipal Employees, AFL-CIO

Representatives of Academic Institutions

1. Bernstein, Merton, Ohio State University Law School
2. Bittker, Prof. Boris I., Yale University
3. Bodkin, Laurence G., Jr., Taxation With Representation
4. Brannon, Dr. Gerard M., Georgetown University
5. Brazer, Prof. Harvey E., University of Michigan
6. Bressler, Barry, associate professor of economics, Richmond College, City University of New York, Taxation With Representation
7. Casner, Prof. A. James, Harvard Law School
8. Davenport, Prof. Charles, Law School, University of California at Davis
9. David, Prof. Martin, University of Wisconsin
10. Eisner, Prof. Robert, Northwestern University
11. Filler, Stuart, Taxation With Representation, Hofstra University Law School
12. Ferguson, Karen, Public Interest Research Group
13. Halperin, Prof. Daniel, Law School, University of Pennsylvania
14. Hambrick, Prof. J. Reid, George Washington University Law School
15. Harriss, Prof. C. Lowell, Columbia University
16. Hjorth, Prof. Roland L., Law School, University of Washington
17. Ludwig, Prof. Ronald L., Washington, D.C.
18. McDaniel, Prof. Paul R., Boston College Law School
19. McGill, Prof. Dan M., University of Pennsylvania
20. Mondani, Thomas D., Connecticut Education Association
21. Musgrave, Prof. Peggy B., Northeastern University
22. Musgrave, Prof. Richard A., Harvard University
23. Myers, Jack, American Council on Education
24. Myers, Robert J., Temple University
25. Nader, Ralph, Public Interest Research Group

26. Pechman, Dr. Joseph A., Brookings Institution
27. Raff, David, director of the clinical program in employees rights at New York University School of Law
28. Reed, Carl E., Bolles School
29. Russell, James M., Research Institute of America
30. Schoeplein, Robert N., Institute of Government & Public Affairs, University of Illinois, Taxation With Representation
31. Smith, Prof. Dan Throop, Hoover Institution
32. Spann, Prof. Robert M., Virginia Polytechnic Institute and State University
33. Stobaugh, Prof. Robert B., Harvard Business School
34. Stone, Prof. Lawrence M., University of California School of Law
35. Surrey, Prof. Stanley S., Harvard Law School
36. Tennant, W. Jack, National Education Association
37. Van Houte, Robert, National Education Association-Alaska
38. Wallich, Prof. Henry C., Yale University
39. Westfall, Prof. David, Harvard Law School
40. Winklevoss, Howard, University of Pennsylvania
41. Withers, William, Taxation With Representation, Queens College of the University of New York
42. Wright, Prof. Arthur W., University of Massachusetts

Individuals

1. Acheson, Richard M., Jr., Pacific Palisades, Cal.
2. Adams, John Q., New York, N.Y.
3. Addison, James Jr., Akron, Ohio
4. Alden, John, Klamath Falls, Or.
5. Anderson, Croil, Seattle, Wash.
6. Anderson, Keith, Arvada, Colo.
7. Antin, Michael, Beverly Hills, Cal.
8. Armer, John E., Los Angeles, Cal.
9. Arneson, J., Geneva, Ill.
10. Artis, H. C., Woodland Hills, Cal.
11. Asling, John, Annandale, Va.
12. Bail, Richard N., Boston, Mass.

13. Bailin, Leonard, New York, N.Y.
14. Baker, Walter, former employee of Essex Wire Corp.
15. Barnes, Robert L., Glen Ellyn, Ill.
16. Baroff, Sam, Philadelphia, Pa.
17. Battestilli, Ray, former employee of Packard Motor Car Co.
18. Bender, Dean, Seattle, Wash.
19. Benedetto, Karen, Dallas, Tex.
20. Berk, Lawrence I., New York, N.Y.
21. Berry, Forrest, San Bernardino, Cal.
22. Bimson, P. L., New York, N.Y.
23. Bladstrom, Walter C., New York, N.Y.
24. Bluestein, Joseph S., Birmingham, Ala.
25. Boatright, A. L., Klamath Falls, Or.
26. Bogert, Jackson, Dallas, Tex.
27. Borjas, A. A., Coral Gables, Fla.
28. Brigman, Paul, Plano, Tex.
29. Brotman, Jeffrey H., Seattle, Wash.
30. Browning, George, III, Sarasota, Fla.
31. Bullion, J. Waddy, Dallas, Tex.
32. Carr, Patrick J., New York, N.Y.
33. Christianson, Olive B., New Canaan, Conn.
34. Connell, Edward F., Jacksonville, Fla.
35. Connell, James R., Washington, D.C.
36. Cooper, Sally, Butler, Pa.
37. Cotter, H. T., Oxnard, Cal.
38. Cronquist, Neil R.
39. Cross, Theodore L., Boston, Mass.
40. Crumlett, Curtis C., Minneapolis, Minn.
41. Curley, Ruth S., Cranston, R.I.
42. Curtis, James, Seattle, Wash.
43. Dahlgren, Donald C., Seattle, Wash.
44. Daly, Mike, former employee of Gar Wood
45. Dauber, Milton A., Jenkintown, Pa.
46. Dean, Carl, formerly of Studebaker Corp.
47. Dobosiewicz, Edward, formerly of Singer Corp.
48. Dobson, John, South Bend, Ind.
49. Dorfman, Milt, Lauderhill, Fla.
50. Duane, Stephen H., Jersey City, N.J.

51. Dudeck, James R., Jacksonville, Fla.
52. Dudley, J. F., Richardson, Tex.
53. Dunbar, Edward G., Sasco, Inc.
54. Ehmann, Anthony, Phoenix, Ariz.
55. Ehrlich, William W., Merion, Pa.
56. Elder, Earle R., Clairton, Pa.
57. Elkus, Robert C., San Francisco, Cal.
58. Endsley, Carolyn E., Atlanta, Ga.
59. Erichson, William M., Cold Spring, N.Y.
60. Ernst, Marion, Mount Prospect, Ill.
61. Ferguson, E. R., Jr., Washington, D.C.
62. Ferster, Herbert, New York, N.Y.
63. Finklea, Jack G., Dallas, Tex.
64. Fischer, Richard S., Rochester, N.Y.
65. Fortenberry, W. F., Spartanburg, S.C.
66. Foster, John D.
67. Fowler, Calvin D., Cocoa, Fla.
68. Fraser, O'Hear W., Jr., Washington, D.C.
69. Gajarsa, Arthur J., Washington, D.C.
70. Garelik, David M., New York, N.Y.
71. Gaspar, August H., San Lorenzo, Cal.
72. Gibala, Edward S., Urbana, Ill.
73. Gibson, Luther E., Vallejo, Cal.
74. Gilbert, Nat, Beverly Hills, Cal.
75. Golder, Barry S., Fort Lauderdale, Fla.
76. Goldmark, John, Seattle, Wash.
77. Goldminz, Abraham Ellis, Carlsbad, N.M.
78. Gonzalez, Richard J., Houston, Tex.
79. Goodin, Kenneth E., San Francisco, Cal.
80. Goodson, Marvin, Beverly Hills, Cal.
81. Gorfinkle, Robert A., South Braintree, Mass.
82. Greeley, Alexander, New York, N.Y.
83. Greer, Mildred, Syracuse, N.Y.
84. Grooms, W. M., Columbia, S.C.
85. Grossman, Arthur I., Chicago, Ill.
86. Grover, Kenneth, New York, N.Y.
87. Haag, John A., Houston, Tex.
88. Hade, Jane, New York, N.Y.
89. Hade, Neal L., New York, N.Y.

90. Hammer, Leonard E., New York, N.Y.
91. Hanke, Peter S., Garlock, Inc.
92. Harney, Ben, Spokane, Wash.
93. Hart, Paul C., Portland, Or.
94. Hastings, Dana M., Dover, Mass.
95. Hayward, Dick, Waterbury, Conn.
96. Hellmuth, C. T., Washington, D.C.
97. Henry, Durward E., Garland, Tex.
98. Hightshoe, Mel, Tyler, Tex.
99. Hill, Gene R., Grayhill, Inc.
100. Hill, Lola, East Lansing, Mich.
101. Hill, Walker, East Lansing, Mich.
102. Holman, R. P., Chattanooga, Tenn.
103. Holmes, Mack F., Brockport, N.Y.
104. Holmes, Ted, former employee of Peerless Cement Co.
105. Hopkins, W. Dean, Cleveland, Ohio
106. Hopson, Thomas A., Durham, N.C.
107. Howard, Gordon, pensioner from the Elgin Co.
108. Hudson, Wayne D., San Francisco, Cal.
109. Iler, F. R., Greensboro, N.C.
110. Ingle, Walter B., Woodland Hills, Cal.
111. Iserson, L., Miami, Fla.
112. Jacobs, Bruce, Los Angeles, Cal.
113. Jacobs, Mary, Mount Pleasant, Pa.
114. Johnson, Harley M., Miami, Fla.
115. Jordan, Raymond E., Cranston, R.I.
116. Jordon, Ray E., Northridge, Cal.
117. Kamm, Seymour J., Clark, N.J.
118. Kamps, M. J., Arlington Heights, Ill.
119. Kazan, Avraam T., M.D.
120. Kennedy, Ron, Peavey Co.
121. King, Corley C., Dallas, Tex.
122. Kinney, Cecil C., Albuquerque, N.M.
123. Kitchell, Samuel F., Phoenix, Ariz.
124. Kleinert, James A., Croton-on-Hudson, N.Y.
125. Knox, Hubbard, New York, N.Y.
126. Kowitz, Patricia E., Palo Alto, Cal.
127. Krieger, Estelle, Chicago, Ill.
128. Krubeck, Ralph O., Lombard, Ill.

129. Krubeck, Ruth M., Lombard, Ill.
130. Kruger, John F., Seattle, Wash.
131. Kuhl, Barry M., Omaha, Neb.
132. Kulzer, Michael A., Cherry Hill, N.J.
133. Kurshan, Richard M., Roanoke, Va.
134. Lane, Robert L., Phoenix, Ariz.
135. Larson, Vincent R., Seattle, Wash.
136. Latture, William E., Greensboro, N.C.
137. Lee, Otis S., Tulsa, Okla.
138. Lerner, Macy L., Rochester, N.Y.
139. Leslie, Robert B., Seattle, Wash.
140. Leventhal, Ronald S., Atlanta, Ga.
141. Lewicki, Peter S., Seattle, Wash.
142. Little, Daniel J., Chicago, Ill.
143. Lochner, Harry W., Jr., Chicago, Ill.
144. Lubick, Donald C., Buffalo, N.Y.
145. Lubitz, Philip H., Garden City, N.Y.
146. Lurie, Alvin D., New York, N.Y.
147. Malley, Glenn, Piedmont, Cal.
148. Manch, David E., Buffalo, N.Y.
149. Mather, Charles E., Philadelphia, Pa.
150. May, Ernest N., Wilmington, Del.
151. McCrea, J. M., Pittsburgh, Pa.
152. McKinley, Jack, Kew Gardens, N.Y.
153. McLaughlin, Ruth C., Lansing, Mich.
154. McNealus, Arthur L., Franklin Square, N.Y.
155. Mead, R. W., Jr., Tampa, Fla.
156. Mears, John, New York, N.Y.
157. Meeker, A. Ross, Jr., Springfield, N.J.
158. Mesik, Eva, Berwyn, Ill.
159. Meyer, Henry V., Denver, Colo.
160. Mikkelson, Robert H., Albany, Or.
161. Miller, Elliot Ira, New York, N.Y.
162. Mills, William, former employee of American Cyanamid
163. Millsap, Russell, Woodland, Cal.
164. Mirikitani, Clifford K., Honolulu, Haw.
165. Mitzel, Kay, San Francisco, Cal.
166. Monfort, Loretta, Livermore, Cal.

167. Monson, John R., Manchester, N.H.
168. Moore, David, Salt Lake City, Utah
169. Moore, George W., III, Bloomfield Hills, Mich.
170. Moroney, William T., Phoenix, Ariz.
171. Neumann, George C., Westbury, N.Y.
172. Nichols, Guy H., Cincinnati, Ohio
173. Nyhart, Eldon H., Indianapolis, Ind.
174. O'Hara, Bernard, former Matatowac employee
175. Olds, John T., New York, N.Y.
176. Osofsky, Lillian, Miami, Fla.
177. Page, Hubert, San Diego, Cal.
178. Partin, Charles, Hurst, Tex.
179. Phillips, Nelda, Dallas, Tex.
180. Pitcher, Theresa, Lansing, Mich.
181. Rappaport, Robert, Van Nuys, Cal.
182. Ray, George E., Dallas, Tex.
183. Raymond, John F., Seattle, Wash.
184. Reade, K. D., Jr., New York, N.Y.
185. Reed, Richard C., Seattle, Wash.
186. Reedy, Harvey E., Little Rock, Ark.
187. Rhue, Robert E., Phoenix, Ariz.
188. Richards, Clyde D., Woodland Hills, Cal.
189. Richter, Emma, St. Louis, Mo.
190. Riggs, Arthur J., Dallas, Tex.
191. Riley, Emil, Bellwood, Ill.
192. Riley, Ena, Bellwood, Ill.
193. Ritsch, Malcolm E., Jr., Richmond, Va.
194. Roesser, Eugene F., Washington, D.C.
195. Rotgin, Philip N., New York, N.Y.
196. Russ, Mr. and Mrs. Bernard, Wantagh, N.Y.
197. Russell, Joe W., Dallas, Tex.
198. Safer, Louis, Jacksonville, Fla.
199. Sanger, Howard L., Palm Springs, Cal.
200. Schroeder, Shirley, Hayward, Cal.
201. Schuchert, Joseph S., Jr., Los Angeles, Cal.
202. Schwartz, Marvin, New York, N.Y.
203. Scott, Arnold D., Dedham, Mass.
204. Seidner, E. L., Chicago, Ill.
205. Sherwin, Douglas S., Ann Arbor, Mich.

206. Sikon, Casimir S., Bensenville, Ill.
207. Silver, George J., Sterling Heights, Mich.
208. Soles, J. Frank, Creve Couer, Mo.
209. Sperry, W. Anson, Mankato, Minn.
210. Spindell, Robert F., Chicago, Ill.
211. Steinman, Bernard, Philadelphia, Pa.
212. Stephens, Ben, Jr., St. Paul, Minn.
213. Stocker, John, New York, N.Y.
214. Strintz, Charles, formerly of C. G. Conn Co.
215. Stuart, David, Miami, Fla.
216. Stubbins, James B., Zanesville, Ohio
217. Sullivan, William T., Burbank, Ill.
218. Susman, Gerald Stephan, Philadelphia, Pa.
219. Swaim, Joseph C., Jr., Pittsburgh, Pa.
220. Tanner, B. Perry, III, Spartanburg, S.C.
221. Tartoloni, Floyd, former Gar Wood Industries employee
222. Taylor, Wm. W., Denver, Colo.
223. Thomas, J. J., Chicago, Ill.
224. Toy, Gerald G., Portland, Or.
225. Trowbridge, C. L., Des Moines, Iowa
226. Van Deuren, Richard A., Milwaukee, Wis.
227. Verdegem, Charles L., Allentown, Pa.
228. Visgar, G. E., Beloit, Wis.
229. Votteler, T. P., Dallas, Tex.
230. Wachtendorf, F. M., Mesquite, Tex.
231. Wainio, Russell E., former Wolverine Tube Division employee
232. Webster, John E., Cleveland, Ohio
233. Weinberg, Michael D., Minneapolis, Minn.
234. Welp, William L., Marshalltown, Iowa
235. Whisman, Clayton J., Westerville, Ohio
236. White, Merle, Klamath Falls, Or.
237. Wilf, Mervin M., Philadelphia, Pa.
238. Windate, George H., Akron, Ohio
239. Wood, R. Edwin, San Francisco, Cal.
240. Woodside, Roy H., Washington, D.C.
241. Wright, Richard F., Rochester, N.Y.
242. Wrinkle, John N., Birmingham, Ala.

243. Yenkin, Bernard K., Columbus, Ohio
244. Young, Howard
245. Zekind, Harry M., St. Louis, Mo.

Additional Written Material Submitted to Congress

Additional Written Material Submitted to Congress

Correspondence

1. Adams, R. L., manager, Employee Security Division, Reynolds Metals Co., letter dated May 9, 1972, to Chairman Mills
2. Adams, R. L., manager, Employee Security Division, Reynolds Metals Co., Richmond, Va., letter dated July 7, 1972, to Senator Williams
3. Anish, Mel, President, Louisiana Home Furnishings Representatives, letter dated May 6, 1972, to Chairman Mills
4. Annunzio, Hon. Frank, a Representative in Congress from the State of Illinois, enclosing a letter, dated April 12, 1973, from Archie L. Stockwell to Chairman Dent
5. Apfelberg, Alvin I., New York, N.Y., letter dated May 11, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
6. Augenblick, Robert L., Investment Co. Institute, letter, dated March 1, 1973, to Chairman Dent
7. Augsburger, Gale, Findlay, Ohio, letter dated December 15, 1971, to Senator Taft
8. Baird, John P., office of the vice president, secretary, and general counsel, Ralston Purina Co., St. Louis, Mo., letter dated July 26, 1968, to Senator Yarborough
9. Baldy, S. J., International Brotherhood of Electrical Workers, System Council No. 4, letter, dated March 24, 1973, to Chairman Dent enclosing 2 exhibits
10. Ballard, J. Vernon, Acting Director, U.S. Department of Labor, letter dated February 15, 1973, enclosing a reprint from Federal Register
11. Barnard, Morton John, Illinois State Bar Association, letter dated May 4, 1972, forwarded by Sheldon S. Cohen
12. Bassett, Preston C., Towers, Perrin, Forster, and Crosby, Inc., Philadelphia, Pa., letter, dated May 23, 1973, to Chairman Dent

13. Batts, Roscoe W., industrial relations, International Harvester Co., letter dated May 9, 1972, to the Committee on Ways and Means
14. Becker, W. E., director of personnel, Hercules Inc., Wilmington, Del., letter dated February 20, 1973, to Chairman Dent
15. Bernstein, Merton C., professor of law, Ohio State University, letter dated July 28, 1972, to Senator Taft
16. Blasier, Robert D., Vice President, industrial relations, Westinghouse Electric Corp., letter dated May 10, 1972, to Chairman Mills
17. Blasier, Robert D., Vice President, industrial relations, Westinghouse Electric Corp., letter dated July 11, 1972
18. Bolf, Joseph W., Keewatin, Minn., letter dated June 19, 1972
19. Boole, Clifford P., St. Louis Park, Minn., letter dated May 3, 1972
20. Brafmen, Stuart M., Vice President, Mortgage Guaranty Insurance Corp., Milwaukee, Wis., letter dated August 16, 1968, with attachment
21. Brennan, Hon. Peter J., Secretary, U.S. Department of Labor, letter to Chairman Dent
22. Brummund, Walter H., Appleton, Wis., letter dated May 8, 1972, to the Committee on Ways and Means
23. Bruskotter, J. W., employee relations, Marathon Oil Co., letter dated May 15, 1972, to Chairman Mills
24. Buesser, Frederick G., State Bar of Michigan, letter dated May 5, 1972, forwarded by Sheldon S. Cohen
25. Buzhardt, J. Fred, General Counsel of the Department of Defense, Washington, D.C., letter dated June 8, 1972
26. Caldwell, Robert J., President, California Products Corp., letter dated April 28, 1972, to Chairman Mills
27. Cameron, James, Winn-Dixie Stores, Inc., Jacksonville, Fla., dated November 3, 1971, to Senator Williams
28. Carton, V. J., manager, employee benefits, Gulf Oil Corp., letter dated May 3, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means

29. Casey, William J., Securities and Exchange Commission, Washington, D.C., letter dated May 6, 1972 (with enclosure)
30. Clarke, David J., Denver (Colo.) Bar Association, telegram dated May 6, 1972, forwarded by Sheldon S. Cohen
31. Cloud, R. Taylor, Director, employee benefits, Columbia Gas System Service Corp, to Noto, Mario T., special counsel, Senate Subcommittee on Labor
32. Coifman, Robert, M.D., Minneapolis, Minn., letter dated June 6, 1972
33. Collier, Boyd F., Virginia Supplemental Retirement System, Commonwealth of Virginia, letter, dated June 25, 1971, to Chairman Dent enclosing General Assembly House Joint Resolution No. 108
34. Connolly, Russell G., Gulf Oil Corp., Pittsburgh, Pa., letter dated July 11, 1972
35. Considine, John R., McKeesport, Pa.
36. Cooper, Edward, Vice President, Motion Picture Association of America, Inc., letter dated August 1, 1968, to Robert O. Harris, subcommittee counsel, with attachments
37. Cooper, J. W., chairman, employee trusts committee, Corporate Fiduciaries Association of Illinois, letter dated May 1, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means, with enclosure
38. Cooper, J. W., chairman, employee trusts committee, Corporate Fiduciaries Association of Illinois, letter dated May 4, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means, with enclosure.
39. Cooper, J. W., Corporate Fiduciaries Association of Illinois, letter dated February 22, 1973, to Chairman Dent, enclosing written statements
40. Cramer, Harold, chancellor, Philadelphia Bar Association, letter dated May 4, 1972, forwarded by Sheldon S. Cohen

41. Cummings, Frank, minority general counsel, Committee on Labor and Public Welfare, U.S. Senate, letter dated June 8, 1972, to Goodman, Isadore, Chief, Pension Trust Branch, Internal Revenue Service, Washington, D.C.
42. Curtis, James A., F.S.A., Milliman and Robertson, Inc., Seattle, Wash., letter dated June 4, 1973, to Chairman Dent
43. Daume, W. B., Monsanto Co., letter dated May 10, 1972, to Chairman Mills
44. Davenport, John S., III, President, Virginia Bar Association, letter dated May 4, 1972, forwarded by Sheldon S. Cohen
45. Davis, Hilton, general manager, legislative action, Chamber of Commerce of the United States, Washington, D.C., letter dated February 20, 1973, to Senator Williams
46. Department of Labor, Washington, D.C., letter dated April 13, 1972, to Noto, Mario T., special counsel, Senate Subcommittee on Labor
47. Dill, Warren, Denver, Colo., letter dated May 5, 1972, to Chairman Mills
48. Dion, Walter J., former R. C. Mahon Co. employee (enclosing letter from the R. C. Mahon Co., dated December 2, 1971)
49. Dixon, G. E., Blue Bell, Inc., letter dated May 17, 1972, to Chairman Mills
50. Donahue, Thomas R., Assistant Secretary of Labor, letter dated September 5, 1968, to Senator Yarborough re: comparison of S. 1024, S. 3421 (Senator Yarborough) with S. 1103 (Senator Javits)
51. Doyle, Paul K., Union Oil Co. of California, letter dated May 8, 1972, to Chairman Mills
52. Dudeck, James R., Jacksonville, Fla., letter to John M. Martin, Jr., chief counsel, Committee on Ways and Means
53. Dulski, Hon. Thaddeus J., Chairman, Committee on Post Office and Civil Service, letter to Hon. Wilbur D. Mills, Chairman, Committee on Ways and Means, and reply thereto from Ullman, Hon. Al, Acting Chairman, Committee on Ways and Means

54. Dwyer, Gilbert E., Vice President, administration, Kennecott Copper Corp., letter to John M. Martin, Jr., chief counsel, Committee on Ways and Means
55. Eales, Rev. Jack D., The Episcopal Church Downtown, Minneapolis, Minn., letter dated June 6, 1972
56. Eck, John E., Jr., American Textile Manufactures Institute, letter dated May 18, 1972, to Chairman Mills
57. Elman, Leonard S., New York, N.Y., letter dated May 12, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
58. Erlewine, John A., Atomic Energy Commission, Washington, D.C., letter dated June 9, 1972
59. Ewell, J. M., Manufacturing and Employee Relations, Procter and Gamble Co., letter dated March 15, 1973, to Chairman Dent, enclosing statement
60. Falstaff Brewing Corp., St. Louis, Mo., letter dated January 11, 1972, to Ballantine, P., & Sons, Newark, N.J.
61. Farrug, Eugene J., economics of legal profession committee, Chicago Bar Association, letter dated May 2, 1972, forwarded by Sheldon S. Cohen
62. Ferguson, William E., Thomson & McKinnon Auchincloss, Inc., letter dated May 1, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
63. Figgins, W. M. (Wes), St. Paul Athletic Club, St. Paul, Minn., letter dated June 3, 1972
64. Finkelstein, Murray, member, Retail Shoe Employees' Union, Local 1268, letter to Senator Williams
65. Finn, Michael F., Arlington, Va., letter dated May 17, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
66. Foster, R. F., director of personnel administration, FMC Corp., letter dated May 5, 1972, to Chairman Mills
67. Freedman, Gerald, legislative committee chairman, New England Home Furnishings Representatives Association, Inc., letter dated May 8, 1972, to Chairman Mills

68. Friend, Edward H., Edward H. Friend and Co., Washington, D.C., letter dated July 3, 1973, to Chairman Dent
69. Gatz, David, Birdsboro, Pa., letter dated May 3, 1972, to Chairman Mills
70. Gemmill, Kenneth W., Dechert, Price & Rhoads, Philadelphia, Pa., letter dated May 5, 1972, to Chairman Mills
71. Gendel, Martin, President, Beverly Hills (Cal.) Bar Association, letter dated May 1, 1972, forwarded by Sheldon S. Cohen
72. Gibala, Edward S., State Universities Retirement System, letter dated April 27, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
73. Glick, Merle H., Caterpillar Tractor Co., letter dated May 9, 1973, to Chairman Dent, enclosing requested information
74. Gillham, Gregg J., Monticello, Minn., letter dated June 7, 1972
75. Goodman, I., Chief, Pension Trust Branch, Internal Revenue Service, letter dated June 23, 1972, to Cummings, Frank, minority general counsel, Committee on Labor and Public Welfare, U.S. Senate
76. Gray, Milton H., Chicago Bar Association, letter dated May 3, 1972, with enclosure, forwarded by Sheldon S. Cohen
77. Griswold, Mary B., administrative assistant to the president, Whitaker Cable Corp., Kansas City, Mo., letter dated October 1, 1971, to Noto, Mario T., special counsel, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare
78. Grout, Richard A., Vice President, Marsh & McLennan, Inc., Detroit, Mich., letter dated June 16, 1972, to Noto, Mario T., special counsel, Senate Subcommittee on Labor
79. Guterman, Frederick H., President and Chief Executive Officer, the Horn and Hardart Co., New York, N.Y., "Dear John Letter" dated June 1, 1972

80. Haley, James A., a Representative in Congress from the State of Florida, letter dated March 27, 1973, to Chairman Dent, enclosing a letter from Douglas A. Matthews, Lakeland, Fla.
81. Harrison, Ronald C., National Home Furnishings Representatives Association, letter dated May 16, 1972, to Chairman Mills
82. Hassler, Keith, Portland, Or., letter dated September 27, 1968, to Senator Morse
83. Hazlehurst, Blackburn H., Hazlehurst and Associates, Inc., letter dated May 30, 1973, to Chairman Dent
84. Heim, Dr. Henry J., president, District of Columbia Dental Society, letter dated May 10, 1972, to Chairman Mills
85. Heinrich, Joe, St. Paul, Minn., letter dated June 4, 1972
86. Hendrickson, Ralph L., Minneapolis, Minn., letter dated June 22, 1972
87. Herman, Elliot A., New York, N.Y., letter dated May 15, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
88. Hickle, H. G., Findlay, Ohio, letter dated December 8, 1971
89. Hickman, Frederic W., U.S. Department of the Treasury, Washington, D.C., letter dated June 9, 1972
90. Hiemstra, James W., Inglewood, Calif., letter dated April 28, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
91. Hill, William J., Fraternal Association of Steel Haulers, Pittsburgh, Pa., letter dated March 28, 1973, to Chairman Dent, enclosing copy of pension fund
92. Hoehn, Kenneth W., Vice President and Treasurer, Columbia Broadcasting System, Inc., letter dated May 9, 1972, to the Committee on Ways and Means
93. Holmes, Wendell H., Vice President, Marsh & McLennan, Inc., Boston, Mass., letter dated April 13, 1971, to Dozier, W. D., manager, Industrial Relations, Benson Manufacturing Co., Kansas City, Mo.

94. Houck, Kenneth L., Bethlehem Steel Corp., letter dated May 10, 1972, forwarded by Mr. Cardon
95. Howard, Dr. Ernest B., Executive Vice President, American Medical Association, letter dated May 19, 1972, to Chairman Mills
96. Hughes, Jim, Georgia Home Furnishings Representatives Association, letter dated May 10, 1972, to Chairman Mills
97. Hunt, W. J., Vice President and Treasurer, Minneapolis-Moline, Inc., Hopkins, Minn., letter dated September 26, 1968
98. Javits, Hon. Jacob K., a U.S. Senator from New York, letter dated October 3, 1968, to Ed Lyman, president, U.S. National Bank of Omaha, Omaha, Neb., with attachments
99. Johnson, Jack B., New England Life, letter dated May 11, 1972, to Chairman Mills
100. Jones, Edward H., Secretary, Iowa State Bar Association, telegram dated May 3, 1972, forwarded by Sheldon S. Cohen
101. Jones, Lowell M., the Firestone Tire & Rubber Co., letter dated May 9, 1972, to Chairman Mills
102. Kadison, Stuart L., president, Los Angeles County (Cal.) Bar Association, letter dated May 3, 1972, to Ways and Means Committee
103. Kane, E. R., Senior Vice President, E. I. duPont de Nemours & Co., letter dated May 11, 1972, to Chairman Mills
104. Kaye, Lloyd S., Vice President, Johnson & Higgins, New York, N.Y., letter dated August 16, 1968, to Senator Yarborough, with attachment
105. Keene, Kenneth K., Vice President and Director, Johnson & Higgins, letter dated May 5, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
106. Kelso, Louis O., Bangert & Co., San Francisco, Calif. letter dated February 21, 1973, to Chairman Dent, enclosing several documents

107. Lafollette, Mary, Alaska Bar Association, telegram dated May 5, 1972, forwarded by Sheldon S. Cohen
108. Lamon, Harry V., Jr., Southern Pension Conference, letter dated May 18, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
109. Lang, Virgil D., Dresser Industries, Inc., letter dated May 10, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
110. Laudig, Mrs. Harry L., Minneapolis, Minn., letter dated June 5, 1972
111. Laughlin, Dr. Carl A., President, American Dental Association, letter dated May 19, 1972, to Chairman Mills, with enclosure
112. Lavercombe, Robert R., President, Cincinnati (Ohio) Bar Association, telegram dated May 4, 1972, forwarded by Sheldon S. Cohen
113. Laxson, Russell W., Honeywell, letter dated August 8, 1972
114. Leff, Edwin E., President, Empire State Home Furnishings Representatives Association, Inc., letter dated May 5, 1972, to Chairman Mills
115. LeMatty, R. S., Blue Bell, Inc., letter dated May 17, 1972, to Chairman Mills
116. Little, Stanley M., Jr., The Boeing Co., Seattle, Wash., letter dated April 23, 1973, to Hon. Lloyd Meeds, enclosing a statement by John M. Look
117. Locke, Edwin A., Jr., American Paper Institute, letter dated March 2, 1973, to Chairman Dent
118. Lucas, William L., Martin Marietta Corp., letter dated May 8, 1972, to Chairman Mills
119. Luebs, Harold W., Administrator, Children's Hospital of Pittsburgh, Pittsburgh, Pa., letter dated October 1, 1968, to Senator Yarborough
120. Malone, John S., Secretary, California Bar Association, telegram dated May 7, 1972, forwarded by Sheldon S. Cohen
121. Mann, L. K., Executive Vice President, Blue Bell, Inc., letter dated May 17, 1972, to Chairman Mills

122. Martin, John H., Litton Industries, Inc., Beverly Hills, Calif., letter dated July 26, 1972
123. Maryanko, Mrs. Dorothy M., Pittsburgh, Pa., letter dated March 20, 1973, to Chairman Dent
124. Mayson, J. D., Dresser Industries, Inc., letter dated July 11, 1972
125. McCabe, C. Law, McKeesport, Pa., letter dated April 18, 1973, to Chairman Dent
126. McKenna, William F., National League of Insured Savings Associations, letter dated May 8, 1972, to Chairman Mills
127. Meyer, Henry V., Denver, Colo., letter dated May 10, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
128. Morris, Edwin A., Blue Bell, Inc., Greensboro, N.C., letter dated May 17, 1972, to Chairman Mills
129. Morris, Edwin A., Blue Bell, Inc., Greensboro, N.C., letter dated June 19, 1972
130. Mullaney, Joseph E., General Counsel, Cost of Living Council, Washington, D.C., letter dated July 7, 1972
131. Munroe, Douglas, director of personnel, Anaconda Co., New York, N.Y.
132. Murphy, Gilbert, ACSW, executive director, Older Adult Special Issues Society, Inc., St. Louis, Mo., letter dated May 12, 1972, to Senator Eagleton
133. Murphy, James J., legislative assistant to Senator Thomas F. Eagleton, letter dated May 10, 1972, to Reynolds, Susan and J. H., J. H. Reynolds and Associates, Inc.
134. Murphy, John J., Assistant Director for Reports and Analysis, Office of Labor-Management and Welfare Pension Reports, U.S., letter dated April 28, 1972, to Schmid, A. E. S., president, American Zinc Co.
135. Naftalin, Neil T., Minneapolis, Minn., letter dated June 6, 1972
136. Noble, Stanley D., president, Council of Profit Sharing Industries, letter dated May 18, 1972, to Chairman Mills

137. Norrgard, Mrs. Martha, St. Paul, Minn., letter dated June 5, 1972
138. Norton, Harold C., Secretary, Alameda County (Cal.) Bar Association, letter dated May 5, 1972, forwarded by Sheldon S. Cohen
139. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Cloud, R. Taylor, director, employee benefits, Columbia Gas System Service Corp.
140. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Gluesenkamp, Lester O., assistant treasurer, Mallinckrodt Chemical Works, St. Louis, Mo.
141. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to King, Mrs. S. L., assistant vice president of personnel, American Telephone & Telegraph Co.
142. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Mayer, Walter, assistant pension plan administrator, Anaconda Co.
143. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Simon, Jerome M., administrator, Local 1260, Retail Shoe Employees Union
144. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Stiffler, Darrell V., Jr., national director of personnel and industrial relations, Great Atlantic & Pacific Tea Co., Inc.
145. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Ward, Patrick A., assistant treasurer, Studebaker Worthington Corp.
146. Noto, Mario T., special counsel, Senate Subcommittee on Labor, letter dated April 24, 1972, to Schmid, Arthur E. S., President, American Zinc Co., St. Louis, Mo.
147. Noto, Mario T., special counsel, Senate Subcommittee on Labor, to Slick, E. E., Jr., President, Haws Refractories Co.
148. Pagliaro, Carmen J., President, Local Union No. 1640, United Steelworkers of America
149. Passero, R. J., President, National Society of Public Accountants, letter dated May 18, 1972, to Chairman Mills

150. Paul, Robert D., President, Martin E. Segal Co., consultants and actuaries, New York, N.Y., letter dated May 24, 1973, to Chairman Dent
151. Paul, Robert D., President, Martin E. Segal Co., consultants and actuaries, New York, N.Y., letter dated September 26, 1972, to Hodgson, Hon. James, Secretary of Labor, Washington, D.C., with attachment
152. Prewett, Hartford H., president, Houston (Tex.) Bar Association, letter dated May 5, 1972, forwarded by Sheldon S. Cohen
153. Randolph, Christopher F., staffmember, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare
154. Reed, J. Price, vice president and director of personnel, Pet, Inc., letter dated May 11, 1972, to Chairman Mills
155. Retired Employees of Findley Div. Sargent Industries, Gar Wood Division, Wayne, Mich., letter dated December 1, 1971
156. Reynolds, Joseph H. and Susan E., J. H. Reynolds & Associates, Inc., St. Charles, Mo., letter dated April 15, 1972, to Murphy, Frank, Office of Senator Thomas F. Eagleton, Washington, D.C. (with attachment)
157. Roban, Mrs. Mary, St. Paul, Minn.
158. Robbins, Paul H., P. E., executive director, National Society of Professional Engineers, letter dated June 23, 1972, to Senator Williams
159. Rogers, Hon. Paul G., a Representative in Congress from the State of Florida, letter dated February 21, 1973, to Chairman Dent, enclosing two letters from Forrest B. Crane and two newspaper articles
160. Rolnick, Louis, ILGWU National Retirement Fund, letter dated August 7, 1972
161. Rommel, Wilfred H., Assistant Director for Legislative Reference, Office of Management and Budget, Washington, D.C., letter dated June 8, 1972
162. Romney, George, Housing and Urban Development, Washington, D.C., letter dated June 15, 1972

163. Rossoff, Arthur L., Chairman, Association of Long Island Engineers & Scientists, letter dated May 19, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means, with enclosure
164. Sagan, John, Ford Motor Co., Dearborn, Mich., letter dated July 10, 1972
165. Scholfield, Jack P., Seattle-King County (Wash.) Bar Association, letter dated May 4, 1972, forwarded by Sheldon S. Cohen
166. Schultz, Mrs. Kenneth, Hopkins, Minn.
167. Scott, D. H., Nabisco, Inc., letter dated May 8, 1972, to Chairman Mills
168. Simon, Stanley C., the Southland Corp., letter dated March 21, 1973, to Vance J. Anderson, subcommittee counsel, enclosing profit-sharing report for 1972 and profit-sharing accounts of eight employees
169. Sorquist, Robert J., Universal Oil Products Co., letter to W. D. Crean, letter dated February 12, 1973, enclosing a letter to Herbert Claus, dated March 17, 1973
170. Sperry, W. A., Mankato, Minn., letter dated June 7, 1972
171. Stenson, Anne, Cleveland, Ohio, letter dated May 19, 1972, with enclosures
172. Stevenson, Carl L., Eastman Kodak Co., letter dated May 12, 1972, forwarded by John A. Cardon
173. Stewart, Samuel B., senior vice chairman of the board, Bank of America, letter dated May 12, 1972, to Chairman Mills
174. Stiffler, Darrell V., Jr., national director of personnel and industrial relations, Great Atlantic & Pacific Tea Co., Inc.
175. Stone, Dale D., Sun Oil Co., letter dated May 4, 1972, to the Committee on Ways and Means
176. Stoops, Dale I., President, Alameda County (Calif.) Bar Association, telegram dated May 6, 1972, forwarded by Sheldon S. Cohen

177. Taft, Hon. Robert, Jr., a U.S. Senator from the State of Ohio, letter to Ulichnie, Michael, Cleveland, Ohio, with enclosure
178. Taggart, John Y., New York, N.Y., letter dated May 18, 1972, to the Committee on Ways and Means
179. Talmadge, George E., Profit Sharing Committee, Bowes Seal Fast Corp., Indianapolis, Ind., letter dated July 20, 1972 with enclosure
180. Tangen, Alice, Minneapolis, Minn., letter dated July 24, 1972
181. The International Union, United Automobile Aerospace, and Agricultural Implement Workers of America (UAW), and Locals 932, 107, 1147
182. Thomas, W. R., Employees Relations Department, Phillips Petroleum Co., Bartlesville, Okla., letter dated August 1, 1972
183. Thomas, W. R., vice president, employee relations department, Phillips Petroleum Co., letter dated May 30, 1972, to Chairman Mills
184. Thome, Michael N., State of California, letter dated May 2, 1973, to Russell J. Mueller
185. Thore, Eugene M., Washington, D.C., letter dated May 16, 1972, to John M. Martin, Jr., chief counsel, Committee on Ways and Means
186. Ulichnie, Michael, United Mine Workers, Cleveland, Ohio, letter dated March 24, 1972
187. Verity, C. William Jr., Armco Steel Corp., letter dated May 4, 1972, to Chairman Mills
188. Wade, Roy, Winn-Dixie Stores, Inc., letter dated October 8, 1971
189. Wall, John R., personnel, Republic Steel Corp., Cleveland, Ohio, letter dated July 28, 1972
190. Ward, Forrest D., Minneapolis, Minn., letter dated June 26, 1972
191. Ward, Patrick A., assistant treasurer, Studebaker Worthington Corp.
192. Warren, Kenneth A., Kimberly-Clark Corp., letter dated July 19, 1972

193. Weber, Philip H., Weber Financial, Inc., Fresno, Calif., forwarded by Hon. B. F. Sisk, a Representative in Congress from the State of California
194. Whitehurst, Hon. William G., a Representative in Congress from the State of Virginia, letter dated May 15, 1972, to Chairman Mills, with enclosures
195. Whyte, William G., Vice President, United States Steel Corp., letter dated May 19, 1972, to Chairman Mills
196. Williams, Hon. Harrison A., Jr., Chairman, Labor Subcommittee, Committee on Labor and Public Welfare, U.S. Senate, Washington, D.C., letter dated July 19, 1970, to Hodgson, Hon. James D., Secretary, Department of Labor, Washington, D.C.
197. Williams, James R., President, National Retail Merchants Association, letter dated May 18, 1972, to Chairman Mills
198. Willis, E. S., representative, General Electric Co., with enclosures
199. Wilson, Wilmot, Findlay, Ohio, letter dated December 10, 1971
200. Wisely, Harold M., group vice president, Eli Lilly & Co., letter dated May 15, 1972, to Chairman Mills
201. Wood, Curtis L., Rocky Mountain Motor Tariff Bureau, letter dated May 16, 1972, to the Committee on Ways and Means
202. Wood, William J., President, Indianapolis Bar Association, letter dated May 10, 1972, to Chairman Mills, with resolution
203. Wurzel, Dr. Edward M., executive director, American Association of Medical Clinics, letter dated May 18, 1972, to Chairman Mills, with statement
204. Wyzlic, Donald B., personnel manager, Minneapolis-Moline, Inc., Hopkins, Minn., letter dated March 3, 1972
205. Young, Thomas, M., F.S.A., of Stone, Young & Co., Glen Ridge, N.J., letter dated April 11, 1972, with enclosure

Articles and Publications

1. "A History of the A. & P. Retirement Plan," the retirement plan adopted by the Great Atlantic & Pacific Tea Co., Inc.
2. "Chapter VIII-Pension-Benefit Plans, Foundations, and Educational Endowments," an Institutional Investors Study
3. "Chef, 72, Mourns a Lost Pension," by Rose DeWolf, from the Philadelphia Inquirer
4. "Interim Report of Activities of Private Welfare and Pension Plan Study, 1971" (S. Rept. 92-634)
5. "Man Who Opposed Union at H&H Now Will Lose Pension," by William Thompson, from the Philadelphia Inquirer
6. "New Approaches to the Housing Crisis," from the Congressional Record-Extensions of Remarks, December 29, 1969
7. "Out of the Cold: Increasing Layoffs Rob Many of Their Pensions as Well as Their Jobs," by Jim Hyatt, from the Wall Street Journal, November 4, 1970, reprint from the Congressional Record, Senate, November 17, 1970
8. "Pension Funds in an Age of Discontinuity," by Julian Gumperz, reprinted from the Financial Analysts Journal, November-December 1970
9. "Prohibited Transactions," provisions of Internal Revenue Code
10. "Terminations of Pension Plans: 11 Years' Experience"
11. "Your Pension: Does It Provide Real Protection?" by Lawrence Hillock, from the Lorain (Ohio) Journal, reprint from the Congressional Record, Senate, November 17, 1970

Plan Documents and Trust Agreements

1. American Zinc Co., Retirement Benefit Plan For Hourly Employees
2. Anaconda Co., Pension Plan, part III

3. Anaconda Co., Pension Plan For Day's Pay Employees, appendix A
4. Benson Manufacturing—Union Employees' Retirement Income Plan, amendment to July 20, 1967
5. Fruehauf Corp., Detroit, Mich., Employee Welfare or Pension Benefit
6. General Electric Co. Pension Plan, part III
7. Great Atlantic & Pacific Tea Co., Inc. Pension Plan, parts I-V
8. Horn & Hardart Retirement Pension Plan
9. Pension trust agreement between F. W. Woolworth Co., and Irving Trust Co., as trustee, for the benefit of employees of F. W. Woolworth Co.
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Pension Studies, Reports and Memoranda

1. American Society of Pension Actuaries, position report on H.R. 2 and H.R. 462

2. Armstrong, Paul, memorandum dated June 1, 1972, regarding chronolgy of subcommittee communications concerning the Columbus Malleable pension plan termination, to Noto, Mario T., Special Counsel, Senate Subcommittee on Labor, with attachments
3. Cookenbach, John M., President, Trust Division, American Bankers Association, technical memorandum
4. Departmental Report: Bureau of the Budget
5. Departmental Report: Department of Transportation
6. Departmental Report: General Accounting Office
7. Diversion of Union Welfare-Pension Funds of Allied Trades Council and Teamsters Local 815, report of the Senate, Committee on Government Operations, June 30, 1966 (S. Rept. 1348, 89th, 2d)
8. Excerpts from the Congressional Record of Apr. 5, 1971, pertinent to the Senate Labor Subcommittee pension study
9. Form P-1 (S. Res. 360) received from American Telephone & Telegraph Co. (Part III)
10. Form P-1 (S. Res. 360) received from D.C. Transit System, Inc. Employees Ret. Plan
11. Form P-1 (S. Res. 360) received from the Genesco Retirement Plan
12. Form P-1 (S. Res. 360) received from the Kendall Co., Walpole, Mass.
13. Form P-1 (S. Res. 360) received from Western Union (Part III)
14. Form P-1 (S. Res. 360) received from Western Union (Part IV)
15. Memoranda regarding chronology of communications between Labor Subcommittee and Baldwin-Lima-Hamilton Corp., June 1, 1972 (with attachments)
16. Mortgage Guaranty Insurance Corp., Milwaukee, Wis. joint memorandum, Government and private enterprise guaranty of pension fund benefits
17. Randolph, Christopher F., staff member, memorandum regarding chronology of communications between Labor Subcommittee and Sargent Industries, June 1, 1972 (with attachments)

18. Welfare and pension plans investigation, 84th Cong., 2d sess., S. Rept. 1734, April 16, 1956

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1. Benson Manufacturing Co. Union Employees' Retirement Income Plan, Report of Sixth Annual Valuation as of January 1, 1971, prepared by Marsh & McLennan, Inc., Boston, Mass., April 1971
2. Employees' Retirement Plans of Dominion Electric Corp., Actuarial Valuation Report
3. Employee welfare or pension benefit plan annual report form as used by GENESCO, Inc., Nashville, Tenn. and Exhibits (submitted by the Genesco Corp.):
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   - Exhibit H: Kress managers dismissed, 1971, with shrinkage involved
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4. Information on Employee Welfare or Pension Benefit Plan Covering Fewer Than 100 Participants (U.S. Department of Labor, Form D-3), Dominion Electric Corp., Year Ending July 31, 1969
5. Plan Annual Report Form (D-2), year ending December 31, 1970
6. Sargent Industries of Michigan, Inc. (formerly Gar Wood Industries), Findlay Plant, Findlay, Ohio, Employee Welfare or Pension Benefit Plan Annual Report Form (D-2)

7. Teachers Insurance and Annuity Association, College Retirement Equities Fund, Report of Premiums and Benefits Under Your Retirement Annuities For Calendar Year ending December 31, 1971

Other Pension Plan Materials

1. Agreement between Genesco, Inc., and Securities and Exchange Commission concerning restrictions of employee stock purchase plan and special stock purchase plan
2. Agreement between the Benson Manufacturing Co. and the union employees, July 20, 1965
3. Application for Pension Allowance, William H. Wheeler
4. Application for Pension, United Mine Workers of America, Michael J. Ulichnie, May 29, 1967 (with attachments)
5. Articles of agreement for the sale of Ingram-Richardson Manufacturing Co. to Park Electrochemical Corp.
6. Authorization for Monthly Pension Allowance, Gar Wood Industries, Inc., William H. Wheeler
7. Information on Applying for Pension, United Mine Workers of America, Welfare and Retirement Fund, Washington, D.C.
8. Joseph Horne Co., pension plan earnings
9. Notice from the R. C. Mahon Co., dated May 25, 1967
10. "Retirement Security," brochure outlining the Retirement Plan of the Anaconda Co.
11. The Savings and Profit Sharing Pension Fund of Sears, Roebuck & Co. employees – Rules and Regulations

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1. Additional New York State forms and regulations pertaining to employee welfare
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3. Regulation 9 — Fiduciary powers of national banks and collective investment funds
4. State of New York official compilation of codes, rules, and regulations
5. State of Wisconsin, office of the commissioner of insurance — classification of registered employee pension and welfare funds, December 31, 1971

Miscellaneous Materials

1. Press release dated Thursday, April 13, 1972, announcing public hearings on administration tax proposal affecting private pension plans
2. Press release of September 20, 1973, inviting submissions of written comments on Senate-passed pension bill
3. Suggested provision for Federal enactment to permit States to regulate employe benefit plans and funds
4. U.S. District Court, Eastern District of Missouri, Eastern Division, Oil, Chemical & Atomic Workers, AFL-CIO, *et al.*, plaintiffs, v. American Zinc Co., *et al.*, defendants, No. 71C 568(2)
5. U.S. District Court, Western District-Western Division, F. Beard, *et al.*, plaintiffs v. Electronics Communications, Inc., defendant, Civil No. 19812-3

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Reporting and Disclosure under Title I of the Employee Retirement Income Security Act of 1974; Final Regulation Relating to Model Simplified Employee Pensions, 45 Fed. Reg. 24,866 (1980) (codified at 29 C.F.R. § 2520 (1992))

Deletion of Regulation Relating to the Elapsed Time Method of Crediting Service of Employee, 45 Fed. Reg. 40,987 (1980) (codified at 29 C.F.R. § 2530 (1992))

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Regulation Relating to Reporting and Disclosure for Short Plan Years 2520.104-50 Short Plan Years, deferral of accountant's examination and report, 46 Fed. Reg. 1,265 (1981) (codified at 29 C.F.R. § 2520.104-50 (1992))

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Limited Relief from Reporting Disclosure, and Claims Procedure Requirements with Respect to Welfare Plans Offering Membership in a Qualified Health Maintenance Organization as an Option, 46 Fed. Reg. 5,882 (1981) (codified at 29 C.F.R. § 2520.2560 (1992))

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Rules and Regulations for Minimum Standards for Employee Benefit Plans; Suspension of Benefit Rules, 46 Fed. Reg. 8,894 (1981)

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Employee Benefit Plans; Reporting and Disclosure, 48 Fed. Reg. 1,712 (1983) (codified at 29 C.F.R. § 2520 (1992))

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Exemption and Alternative Method of Annual Reporting for Plans Investing in Certain Equities, 51 Fed. Reg. 41,285 (1986) (codified at 29 C.F.R. § 2520 (1992))

Final Regulation Relating to Definition of Plan Assets; Corrections 2510.3-101, 51 Fed. Reg. 47,226 (1986) (codified at 29 C.F.R. §§ 2509, 2510, 2550 (1992))

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Bonding under the Federal Employee's Retirement System Act of 1986, 52 Fed. Reg. 35,864 (1987) (codified at 29 C.F.R. § 2582 (1992))

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Definition of Plan Assets; Participant Contributions, 53 Fed. Reg. 17,628 (1988) (codified at 29 C.F.R. § 2510 (1992))

Final Regulation Relating to Civil Penalties under ERISA Section 502(i), 53 Fed. Reg. 37,474 (1988) (codified at 29 C.F.R. § 2560 (1992))

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No. 75-2: Interpretive Bulletin relating to prohibited transactions, 40 Fed. Reg. 31,598 (1975) (codified in 29 C.F.R. § 2509.75-2 (1992))

No. 75-3: Interpretive Bulletin relating to investments by employee benefit plans in securities of registered investment companies, 40 Fed. Reg. 31,599 (1975)

No. 75-4: Interpretive Bulletin relating to indemnification of fiduciaries, 40 Fed. Reg. 31,599 (1975)

No. 75-5: Questions and Answers relating to fiduciary responsibility, 40 Fed. Reg. 31,599 (1975)

No. 75-6: Interpretive Bulletin relating to fiduciary responsibility, 40 Fed. Reg. 31,755 (1975)

No. 78-1: Interpretive Bulletin relating to payments by certain employee welfare benefit plans, 43 Fed. Reg. 58,565 (1978) (codified at 29 C.F.R. § 2509.78-1 (1992))

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Year	Total Number of Opinions	Number of Opinions Addressing Fiduciary Responsibility	Opinions Addressing Fiduciary Responsibility
1974	2	none	none
1975	90	11	75-24, 75-79, 75-80, 75-81, 75-83, 75-89, 75-90, 75-93, 75-94, 75-95, 75-137
1976	95	4	76-33, 76-35, 76-70, 76-74
1977	85	15	77-32A, 77-33, 77-34, 77-35, 77-46, 77-55, 77-60, 77-61A, 77-66, 77-67A, 77-73A, 77-78A, 77-79, 77-80A, 77-81A
1978	33	3	78-28A, 78-30A, 78-29
1979	90	2	79-56A, 79-90A
1980	74	5	80-28A, 80-30A, 80-33A, 80-39A, 80-073A
1981	90	8	81-005A, 81-012A, 81-029A, 81-030A, 81-052A, 81-062A, 81-072A, 81-083A
1982	68	4	82-001A, 82-024A, 82-026A, 82-033A, 82-045A
1983	62	none	none
1984	47	1	84-014A
1985	43	1	85-041A
1986	28	2	86-001A, 86-011A

Year	Total Number of Opinions	Number of Opinions Addressing Fiduciary Responsibility	Opinions Addressing Fiduciary Responsibility
1987	11	1	87-003A
1988	18	3	88-008A, 88-014A, 88-016A
1989	33	6	89-008A, 89-009A, 89-025A, 89-028A, 89-029A, 89-031A
1990	48	none	none
1991	47	1	91-028A
1992	27	2	92-011A, 92-022A
1993	11	none	none
Total	1,002	69	

Department of Labor
Interpretive Bulletin 75-2
(Feb. 6, 1975),
40 Fed. Reg. 31,598
(July 28, 1975)

Department of Labor Interpretive Bulletin 75-2
February 6, 1975

§2555.75-2 Interpretive bulletin relating to prohibited transactions.

On February 6, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-2, with respect to whether a party in interest has engaged in a prohibited transaction with an employee benefit plan where the party in interest has engaged in a transaction with a corporation or partnership (within the meaning of section 7701 of the Internal Revenue Code of 1954) in which the plan has invested.

Generally, investment by a plan in securities (within the meaning of section 3(20) of the Employee Retirement Income Security Act of 1974) of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make such assets of the entity "plan assets" and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.

For example, if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company will not, solely because the plan has been issued such a contract or policy of insurance, be a prohibited transaction.

Similarly, for example, where a plan acquires a security of a corporation or a limited partnership interest in a partnership, a subsequent lease or sale of property between such corporation or partnership and a party in interest will not be a prohibited transaction solely by reason of the plan's investment in the corporation or partnership.

This general proposition, as applied to corporations and partnerships, is consistent with section 401(b)(1) of the Act, relating to plan investments in investment companies registered under the Investment Company Act of 1940. Under section 401(b)(1), an investment by a plan in securities of such an investment company may be made without causing, solely by reason of such investment, any of the assets of the investment company to be considered to be assets of the plan.

However, the preceding paragraphs do not mean that an investment of plan assets in a security of a corporation or partnership may not be a prohibited transaction. For example, section 406(a)(1)(D) prohibits the direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan and section 406(b)(1) prohibits a fiduciary from dealing with the assets of the plan in his own interest or for his own account.

Thus, for example, if there is an arrangement under which a plan invests in, or retains its investment in, an investment company and as part of the arrangement it is expected that the investment company will purchase securities from a party in interest, such arrangement is a prohibited transaction.

Similarly, the purchase by a plan of an insurance policy pursuant to an arrangement under which it is expected that the insurance company will make a loan to a party in interest is a prohibited transaction.

Moreover, notwithstanding the foregoing, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or partnership will ordinarily be a prohibited transaction if the plan may, by itself, require the corporation or partnership to engage in such transaction.

Similarly, if a transaction between a party in interest and a plan would be a prohibited transaction, then such a transaction between a party in interest and such corporation or

partnership will ordinarily be a prohibited transaction if such party in interest, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest may, with the aid of the plan but without the aid of any other persons, require the corporation or partnership to engage in such a transaction. However, the preceding sentence does not apply if the parties in interest engaging in the transaction, together with one or more persons who are parties in interest by reason of such persons' relationship (within the meaning of section 3(14)(E) through (I)) to such party in interest, may, by themselves, require the corporation or partnership to engage in the transaction.

Further, the Department of Labor emphasizes that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the application of the fiduciary responsibility provisions of the Act to be in contravention of the provisions of section 404(a) of the Act.

Department of Labor
Advisory Opinion 75-79
(Feb. 7, 1975)

Department of Labor Advisory Opinion 75-79

P/OPINION 75-79

February 7, 1975

Dear :

In response to your letter of January 24, 1975, enclosing a letter dated January 13, 1975, from of The Life Company, I am pleased to be able to give the following guidance:

Our latest interpretative bulletin ERISA IB 75-2, a copy of which is enclosed herewith, makes clear that when a plan purchases a policy or policies on an insurance company's general assets account, the plan assets consist of the policy, and not the underlying assets of the insurance company. If all the plan assets consist of such policies, the responsibility of plan fiduciaries to exercise the section 404(a) requirements of the Employee Retirement Income Security Act of 1974 (ERISA) in the selection of the insurance company and the policies purchased would be the major responsibility which could give rise to liability (assuming that section 406 does not apply to the transaction with the particular insurance company).

As for the section 404(a)(1)(C) requirement of diversification if 100% of the plan assets are in policies written on the general asset account, the Conference Report states "generally a plan may be invested wholly in insurance or annuity contracts without violating the diversification rules, since generally an insurance company's assets are to be invested in a diversified manner."

With respect to the question of comparing liability in the insurance situation to those of other modes of investment, much would depend on the individual situation. As to the need for fiduciary liability insurance, as you know, section 410(b) of the Act allows such insurance, but does not require it. The question of whether such insurance is necessary in any particular case is a matter for consideration by the fiduciary and his adviser.

Sincerely,

Department of Labor
Advisory Opinion 78-8A
(Mar. 13, 1978)

Department of Labor Advisory Opinion 78-8A

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs

Washington, D.C. 20216

MAR 13 1978

OPINION 78-8 A

Eugene T. Rossides, Esq.
Rogers & Wells
1666 K Street, N.W.
Washington, D.C. 20006

3(17)
401(b)(2)
408(c)(2)

Re: College Retirement Equities Fund

Dear Mr. Rossides:

This is in reply to your letter of November 17, 1976 in which you request on behalf of the College Retirement Equities Fund (CREF) a ruling that assets held by CREF in its "general" account to support obligations arising under variable annuity contracts issued by CREF and sold to pension plans are not assets of such plans, and, therefore, that the individual members of CREF's Board of Trustees are not fiduciaries of such plans who would be subject to the requirements of the Employee Retirement Income Security Act of 1974 (the Act). Specifically, CREF requests such ruling so that the Act's prohibition against double compensation of fiduciaries will not apply to those CREF trustees who are professors or administrative officers of institutions which use annuity contracts issued by CREF to fund their pension plans.

In your letter you set forth the following facts and representations. CREF is a nonprofit educational organization which is regulated by the New York Insurance Department and is licensed by the insurance departments of four other states. It is the companion organization to Teachers Insurance and Annuity Association of America (TIAA), a nonprofit organization established to provide a pension system and related benefits for institutions of higher education. In the TIAA-CREF pension system, TIAA provides the fixed annuity component and CREF the variable annuity.

A participant under a contract issued by CREF accrues accumulation units based upon premiums paid and dividends and other income earned on the assets held in CREF's "general" account which support obligations under such contracts. The value of a participant's accumulation units (the participant's accumulation) is not guaranteed, and varies with the market value of the CREF investment portfolio to reflect, in part, the realized and unrealized capital appreciation of the assets in the portfolio. When a participant retires, the participant's accumulation, after making provision for appropriate operating charges, must be applied to the purchase of an annuity under one of the variable payment options, or, in certain circumstances, an annuity issued by TIAA. The dollar amount the retired participant receives under a contract issued by CREF changes from year to year to reflect the value of his annuity units. If a participant should die before retirement, then the participant's accumulation will be paid to the named beneficiary.

All CREF premiums are placed in its "general" account; no assets are separately managed.

Several of the individual members of CREF's Board of Trustees are professors or administrative officers of institutions which use CREF annuity contracts as funding media for their pension plans. Your letter represents that the responsibilities of a trustee include overall administration and operation of the CREF "general" account and that all board members are selected to serve solely by reason of their expertise in pension or investment matters. All trustees, except those who are CREF officers, are paid an annual stipend and meeting attendance fees and are reimbursed for expenses incurred in attending meetings.

Your letter suggests that because all CREF assets are held in its "general" account and because CREF does not segregate or separately manage any of its assets, ERISA IB 75-2 (40 FR 31598, July 28, 1975) provides that assets held by CREF do not constitute assets of the pension plans which are funded by annuity contracts issued by CREF. ERISA IB 75-2 states that when an insurance company issues an insurance contract to a plan and

places the consideration for such contract in its general asset account, the assets in such account shall not be considered to be plan assets.

Although CREF labels its account a "general" account, it is the view of the Department of Labor (the Department) that the assests in the account which support obligations under variable annuity contracts issued to pension plans are plan assets. Section 401(b)(2) of the Act states that when an insurance company issues a guaranteed benefit policy to a plan, the assets of the plan do not, solely by reason of the issuance of such policy, include any assets of the insurance company. Section 401(b)(2)(B) defines the term "guaranteed benefit policy" to include, among other things, any surplus in a separate account but to exclude any other portion of a separate account. The annuity contracts issued by CREF provide for variable benefits; generally assets supporting obligations under these contracts are held in a separate account. The term "separate account" is defined in section 3(17) as an account under which income, gains or losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains or losses of the insurance company.

The legislative history of sections 3(17) and 401(b)(2) of the Act makes it clear that the assets in an insurance company account which support variable annuity contracts shall constitute plan assets. At pages 296-97 of the Conference Report the conferees stated:

> An insurance company also is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company. If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

(However, such assets need not be held in trust under the fiduciary responsibility rule.)

Additionally, it is understood that assets placed in a separate account managed by an insurance company are separately managed and the insurance company's payments generally are based on the investment performance of these particular assets. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets (but need not be held in trust). However, to the extent that insurance companies place some of their own funds in these separate accounts to provide for contingencies, this separate account "surplus" is not to be subject to the fiduciary responsibility rules.

The Department believes that the above language evidences a Congressional intent that when an insurance company provides investment advice which determines the rate of return to the plan and its participants, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary responsibility provisions of the Act.

As stated in your letter, the annuity payments to which a participant or beneficiary will be entitled are dependent upon the investment performance of the assets held by CREF. The CREF account thus constitutes a separate account as defined by the Act and the assets therein are plan assets pursuant to section 401(b)(2). ERISA IB 75-2 was based in part upon the Department's understanding that the various state laws which regulate insurance companies prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset account. It was not intended to modify or alter the basic statutory scheme of section 401(b)(2) of the Act.

Although your letter does not specify in detail the duties and responsibilities of a CREF trustee, it would appear that the trustees are plan fiduciaries pursuant to section 3(21)(A)(i) of

the Act by virtue of being persons who exercise any authority or control respecting the management or disposition of plan assets and, therefore, are also parties in interest with respect to such plan, pursuant to section 3(14)(A). Section 406(a)(1)(C) and (D) of the Act prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect furnishing of goods, services, or facilities between the plan and a party in interest or a transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. Furthermore, section 406(b)(1) and (3) of the Act prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account and from receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan. Section 408(c)(2) of the Act, however, provides that nothing in section 406 shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred. Thus, section 408(c)(2) of the Act would not permit those CREF trustees who are professors or administrative officers of institutions which use CREF annuity contracts to fund their pension plans to receive compensation, other than reimbursement of expenses properly and actually incurred, for the performance of their fiduciary duties because they already receive full-time pay from an employer or association of employers whose employees are participants in a plan.

Because the above discussion also raises questions under section 4975 of the Internal Revenue Code of 1954 (the Code), which is within the jurisdiction of the Internal Revenue Service (the Service), we have conferred with representatives of the Service

and they concur in the position set forth above as it relates to section 4975 of the Code to the extent the assets managed are assets of a plan or plans as defined by section 4975(e)(1) of the Code.

In order to compensate those board members who are professors or administrative officers of participating institutions, CREF must obtain an exemption from the prohibitions of sections 406(a)(1)(C) and (D) and 406(b)(1) and (3) of the Act.

The foregoing was discussed at a conference held on February 21, 1978 at the Service, at your request, and attended by yourself, Mr. William F. Heller, Assistant General Counsel of CREF, and representatives of the Department and the Service.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). Accordingly, this letter is issued subject to the Procedure including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions

Department of Labor
Advisory Opinion 83-51A
(Sept. 21, 1983)

Department of Labor Advisory Opinion 83-51A

U.S. Department of Labor	Labor-Management Services Administration
Washington, D.C. 20216

SEP 21 1983	Reply to the Attention of:

OPINION NO. 83-51A

Sec. 401(b)(2)
3(17)

Lawrence J. Hass
Groom and Nordberg, Chartered
1775 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20006

Re: Identification Number: F-2584A

Dear Mr. Hass:

This is in response to your request for an advisory opinion on behalf of the Prudential Insurance Company of America, the Equitable Life Assurance Society of the United States, John Hancock Mutual Life Insurance Company, the Connecticut General Life Insurance Company, Aetna Life Insurance Company, and the Mutual Life Insurance Company of New York. You have asked that the Department of Labor (the Department) issue an advisory opinion that assets held by insurance companies in certain separate accounts that are maintained solely in connection with fixed contractual obligations of an insurance company are not plan assets for purposes of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).

In your opinion request, you describe certain contracts for retirement plans that provide guarantees of return of the principal amount deposited under the contract (plus accrued interest) on a fixed date or dates in the future and the crediting of interest

at a rate fixed under the contract. You also indicate that, in recent years, many insurance companies have established separate accounts to which funds deposited under such contracts are allocated. In addition, you indicate that an insurance company may also allocate the premium received in connection with certain nonparticipating fixed annuity contracts to a separate account. According to your letter, these contracts provide fixed annuity payments to retirees for life and the amount paid out under the contract is not affected by the investment performance of the separate account.

On September 15, 1981 the Department issued Prohibited Transaction Exemption 81-82 (PTE 81-82) which grants relief from the prohibited transaction provisions of section 406(a) and 407(a) of ERISA and sections 4975(c)(1)(A) through (D) of the Internal Revenue Code of 1954 (the Code) with respect to transactions involving certain "guaranteed contract separate accounts" established and maintained by life insurance companies solely in connection with guaranteed investment contracts and nonparticipating fixed annuity contracts issued to employee benefit plans. Also on September 15, 1981 the Department proposed exemptive relief from the provisions of section 406(b) of ERISA and section 4975(c)(1)(E) and (F) of the Code. That proposed exemption has not been granted.

You have asked for an advisory opinion to the effect that the assets in guaranteed contract separate accounts, as that phrase is defined in PTE 81-82, are not plan assets for purposes of Title I of ERISA.

Section 401(b)(2) of ERISA provides that in the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

Section 3(17) of ERISA provides that the term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

In the Department's view, a separate account would not hold "plan assets" for purposes of the fiduciary responsibility provisions of ERISA if it is maintained by an insurance company solely in connection with its fixed contractual obligations and if neither the amount payable (or credited to) the plan or to any participant or beneficiary of the plan (including an annuitant) is affected in any way by the investment performance of the separate account. Since it appears that the contracts described in your letter provide for fixed obligations of the insurance company and that the investment performance of the separate accounts described in your letter do not, in any circumstances, affect the insurance company's obligations to either the plan to which the contract is issued or to its participants and beneficiaries, such separate accounts would therefore not be considered to hold "plan assets." We note, however, that a conventional separate account (which holds contributions received from a plan and provides for the crediting of income on such amounts based upon the investment experience of the separate account) would not be considered to be maintained in connection with a fixed contractual obligation of the insurance company merely because assets of the separate account are ultimately applied to provide fixed annuities to participants, and the assets of such a separate account would be considered to be plan assets.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976). Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator
for Fiduciary Standards
Pension and Welfare Benefit Programs

(3)

No. 92-1074

In the

Supreme Court of the United States

October Term, 1992

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

vs.

HARRIS TRUST AND SAVINGS BANK, As Trustee of the
Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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July 9, 1993

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No. 92-1074

IN THE

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OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

HARRIS TRUST AND SAVINGS BANK, As Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

Respondent Harris Trust and Savings Bank, as Trustee of the Sperry Master Retirement Trust No. 2 (and its successor the Unisys Master Trust) (the "Trustee"),[1] submits this brief in opposition to those of Petitioner John Hancock Mutual Life Insurance Company ("Hancock"), and *amici* the United States of America, filed on behalf of the Department of Labor (the "DOL"), the State of New York and the Commonwealth of Massachusetts (the "Insurance Commissioners"), the American

[1] The "Trustee" refers to Sperry Corporation and its predecessors from 1941 until May 1, 1978, Chase Manhattan Bank, N.A. from 1978 until October 1, 1987 and, its successor, Harris Trust and Savings Bank thereafter. Harris Trust and Savings Bank is acting as party to this appeal only in its capacity as Trustee of the Plan and is not otherwise affected by the outcome of this litigation. The Bank of Montreal is a parent of Harris Trust.

Council on Life Insurance ("ACLI"), and the Life Insurance Counsel of New York ("LICONY").[2]

This case presents the question of whether the fiduciary protections of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA"), extend to pension plan assets deposited in insurance company general accounts. In this case, the Sperry Retirement Program and its successor, the Unisys Pension Plan (the "Plan"), deposited funds with Hancock under a group annuity contract, GAC 50. While a portion of the funds held under GAC 50 support guaranteed benefits for Plan beneficiaries, a significant portion of GAC 50's assets (the "free funds") support no benefits whatsoever. With respect to the free funds, Hancock is acting as an investment manager and not as an insurer. The exemption from ERISA's fiduciary provisions only extends, and was intended by Congress only to extend, to the portion of GAC 50's assets that supports guaranteed benefits.

STATEMENT OF THE CASE

The Plan is a defined benefit plan under which benefit levels are established by the Plan sponsor[3] and are based upon years employed and income earned. The benefits are funded through a variety of investment vehicles, including GAC 50. When GAC 50 was originally entered into by the parties as of March 1, 1941, the contract provided for the annual purchase of individual deferred annuities from Hancock for each eligible employee, with contributions paid to Hancock by Sperry and deposited in Hancock's general account (J.A. 84, ¶¶ 5-7).[4]

[2] These briefs are cited below, respectively, as follows: "Hancock at ____"; "U.S. at ____"; "NYMA at ____"; "ACLI at ____"; and "LICONY at ____."

[3] The Plan sponsor was Sperry Corporation and its predecessor, Sperry Rand Corporation, until November 12, 1986, and Unisys Corporation thereafter (collectively, "Sperry").

[4] References to the pages of the Joint Appendix, the Appendix to the Petition for a Writ of Certiorari, the Appendix to Hancock's Brief and the Joint Appendix submitted to the Second Circuit are cited at "J.A. ____," "P.A. ____," "H.A. ____," and "S.C.A. ____," respectively.

This type of contract was typical for its time. However, as competition between banks and insurance companies for investment of pension monies increased, the insurance industry developed more flexible contracts. *See generally*, D.McGill & D. Grubbs, *Fundamentals of Private Pensions* 492, 550-51, 562-64 (6th Ed. 1989). Consistent with this phenomenon, as of January 1, 1968, GAC 50 was converted from a deferred annuity to a Retrospective Immediate Participation Guarantee ("Retro-IPG") form of contract (the "1968 amendment") (J.A. 87, ¶ 23). The deferred annuities purchased prior to January 1, 1968 were cancelled and the assets supporting them were placed in a Pension Administration Fund (the "PA Fund") maintained by Hancock within its general account (J.A. 88, ¶25; J.A. 89, ¶32; J.A. 117, 126-72).

In its Retro-IPG form, net investment income from Hancock's general account was directly credited to GAC 50's PA Fund on an annual basis (J.A. 88). The amount credited depended upon Hancock's general account investment performance and the allocation of that performance to the PA Fund (*Id.*).[5] The 1968 amendment required that the PA Fund be maintained at a level sufficient to meet the Liabilities of the Fund ("LOF") as computed by Hancock. LOF is the contractual reserve for the benefit obligations guaranteed by Hancock. For the pre-1968 cancelled annuities, LOF was computed assuming investment rates of 2½ or 3%, depending upon when the benefits were first guaranteed. GAC 50 required that the PA Fund balance be maintained at a minimum operating level of at least 105 percent of LOF (J.A. 88-89). The amount in the PA Fund in excess of this minimum level was referred to by Hancock as "free money" or "free funds" (S.C.A. 250-56).

[5] In the court below, Hancock argued that one way in which investment risk was shifted from the Plan to Hancock was through Hancock's alleged guarantee of the principal balance of GAC 50's PA Fund. Although Hancock has not argued this claim before this Court, the DOL now contends that Hancock provided a guarantee of principal under GAC 50. See U.S. at 3. In fact, Hancock "guaranteed" only that the cumulative net rate of return for GAC 50 since 1968 would not fall below zero (J.A. 88, ¶ 27). In reality, this meant that by 1983, when this action commenced, less than $2 million of the PA

(Footnote continued)

If Sperry failed to maintain the PA Fund balance at or above the minimum level, the PA Fund would be terminated (J.A. 89, ¶ 36). In addition, if the Trustee sought to remove the "free funds" through the contract's transfer provisions, the PA Fund would automatically terminate (J.A. 137; S.C.A. 519, ¶ 10; 559, ¶ 10). Upon termination, the contract would cease to function as a Retro-IPG, the cancelled pre-1968 annuities would be "repurchased" by Hancock using the old 2½ and 3% assumptions, and the contract would revert to its previous deferred annuity form (*id.*; J.A. 89-91). The PA Fund balance in GAC 50 has exceeded the LOF since 1968, although only nominal contributions have been made since that time (J.A. 90, ¶ 38; S.C.A. 656).

The 1968 amendment also contained a provision for additional benefit payments prospectively guaranteed by Hancock. Upon the retirement of an eligible employee, Hancock would determine the amount by which the LOF would increase if the portion of the retirement benefit which accrued after January 1, 1968 were to be guaranteed by Hancock. If GAC 50's PA Fund balance exceeded 105% of the increased LOF, Hancock would guarantee the payment of the additional pension benefits. Pursuant to the 1968 amendment, the purchase rate for these additional annuities was guaranteed until the end of 1972. Thereafter, Hancock had the unilateral right to set the purchase rate for any future annuity guarantees (J.A. 90, ¶ 39).

As of August 1, 1977, GAC 50 again was amended. This amendment converted GAC 50 to a Retrospective Immediate Participation Guarantee/Prospective Deferred Liability form of contract (the "1977 amendment") (J.A. 96-97, ¶ 80). The central feature of the 1977 amendment was the addition of "non-guaranteed benefits." Under the amendment, the Plan was entitled to designate employees to receive non-guaranteed benefits using the free funds in the PA Fund (J.A. 97, ¶ 82). The Plan

Fund's balance, then over $100 million, would have been considered "principal," and by 1984, there was no remaining "principal" because cumulative benefit payments then exceeded the initial starting balance of GAC 50 (J.A. 656, ¶ 9). Thus, in 1983, Hancock would have had to lose at least $100 million of PA Fund monies before its "guarantee of principal" would take effect.

remained ultimately responsible for the pension liability to such individuals; it did not shift the payment risk to Hancock (J.A. 240-49).

In addition, although pre-1968 guarantees would remain in place under the 1977 amendment, benefit accruals after January 1, 1968 for those employees who had not yet retired would not be guaranteed by Hancock (J.A. 96-97, ¶ 80). Although the Plan could request that Hancock establish guaranteed benefits in addition to those already guaranteed, it has never done so (J.A. 97, ¶ 81). Under the 1977 amendment, Hancock continued to have the unilateral right to set the purchase rate for any additional benefits guaranteed under the contract.

Hancock paid non-guaranteed benefits on a monthly basis through June of 1982, when it gave notice that it would no longer pay any non-guaranteed benefits (J.A. 97, ¶¶ 83-84). Also during 1982, Hancock announced that it would no longer permit the Plan to use an informal "rollover" facility to withdraw any portion of the "free funds" in the PA Fund (J.A. 96, ¶¶ 77-79). Thus, by 1983 the Plan had only one avenue available to withdraw these "free funds" for Plan purposes — it could request a complete transfer of all such funds.[6]

Such a transfer, however, would allow Hancock automatically to terminate the PA Fund, thus triggering the "repurchase" of the old pre-1968 deferred annuities and permitting Hancock to hold the bulk of the assets associated with "guaranteed" benefits until either the last retiree or beneficiary died or was no longer entitled to annuity payments (J.A. 137; S.C.A. 519, ¶ 10; S.C.A. 559, ¶ 10; J.A. 89-91, ¶¶ 33, 36, 37, 40 and 42). The low investment rate assumptions used to price the "repurchased" annuities made this alternative prohibitively expensive, effectively preventing the Plan from using the "free funds" in the PA Fund for any pension purposes.

On July 20, 1983, the Trustee commenced this action. In its amended complaint, filed in 1984, the Trustee alleged that Hancock was an ERISA fiduciary as to the PA Fund. The Trustee

[6] Prior to an amendment to GAC 50 in 1988, GAC 50 did not contain any mechanism for a partial withdrawal of "free funds" (J.A. 109-263).

sought to recover the excess funds improperly withheld by Hancock, the losses resulting from Hancock's breach of fiduciary duties under ERISA and common law,[7] the profits made by Hancock using Plan monies, and damages in an amount to be determined at trial. The amended complaint also sought the removal of Hancock as fiduciary, judgment enjoining Hancock from further violations of its duties, and other relief (J.A. 49-71).

As of 1983, there was $18 million in free funds in the PA Fund and by 1988, the free funds had grown to more than $53 million (S.C.A. 457; S.C.A. 561). During 1988, on the eve of the filing of summary judgment motions on the issue of whether Hancock was an ERISA fiduciary, Hancock agreed to a contract amendment which permitted the Trustee to transfer "free funds" out of Hancock's general account without triggering the termination of the PA Fund and Hancock's "repurchase" of the pre-1968 deferred annuities at confiscatory prices (the "1988 amendment") (J.A. 109-263; S.C.A. 519, ¶ 10; S.C.A. 559, ¶ 10; S.C.A. 561).[8] Pursuant to the 1988 amendment, the Trustee transferred nearly $53 million out of the PA Fund on November 1, 1988 (S.C.A. 561).[9]

[7] Such violations included Hancock's use of plan assets to subsidize other lines of business and to attract new business, all at the expense of older pension customers such as the Plan. To cite but one example, Hancock admittedly reduced the rate of return on older contracts such as GAC 50 in order to artificially raise the rate of return on newly-issued contracts during their first two years (S.C.A. 1064-87, ¶¶ 9-14; J.A. 94, ¶¶ 60-62).

[8] Surprisingly, Hancock insinuates that, prior to 1988, the Trustee had the right to freely transfer "free funds" out of GAC 50's PA Fund to other pension plan funding vehicles. Hancock at 9, n. 18. While noting that such a transfer would be subject to a market value adjustment which the Plan allegedly considered "uneconomical," U.S. at 5, the DOL also appears to believe that the Trustee was free to request a transfer of GAC 50's "free funds." *Id.* As noted above, the transfer provision described by Hancock *did not exist* prior to 1988.

[9] The transfer mitigated future damages resulting from Hancock's refusal to allow the excess funds to be withdrawn from the PA Fund or used to pay non-guaranteed benefits. The transfer did not ameliorate the substantial damages sustained to that point by the Plan as a result of Hancock's management and control over such excess funds, or the damages flowing from Hancock's self-dealing and over-compensation with respect to GAC 50 as a whole.

In two separate opinions, the district court granted summary judgment dismissing the Trustee's ERISA fiduciary claims, *Harris Trust and Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 722 F. Supp. 998 (S.D.N.Y. 1989) (P.A. 21-62) ("*Harris I*"), and dismissing the contractual and other common law claims. *Harris Trust and Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 767 F. Supp. 1269 (S.D.N.Y. 1991) (P.A. 63-87) ("*Harris II*"). On appeal, the court below reversed with respect to the dismissal of the Trustee's ERISA claims relating to Hancock's handling of the "free funds" in the PA Fund. *Harris Trust and Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138 (2d Cir. 1992) (P.A. 1-18).[10]

The Second Circuit held that the "free funds" in Hancock's general account are "plan assets" under ERISA, and that Hancock is an ERISA fiduciary to the extent that it has exercised authority or control with respect to the management and investment of such funds. The court of appeals rejected Hancock's claims that GAC 50 was a "guaranteed benefit policy" in its entirety and that the "free funds" were exempt from plan asset treatment. The court concluded that, until the "free funds" were used by the Plan to purchase guaranteed benefits, Hancock was managing assets of the Plan as to which it had provided no guarantees. The court reasoned that it was not significant that these assets were held in Hancock's general account in view of "Hancock's discretionary authority over the non-guaranteed phase of the contract." P.A. 10-11. The Second Circuit concluded that Hancock:

> has maintained funds that were not converted to fixed, guaranteed obligations but instead were subject to fluctuation based on the insurer's investment performance. But the statute defining "guaranteed benefit policy," as noted previously, refers only to that phase of the contract in which the insurer is obligated to guarantee fixed benefits to plan participants. *To the*

[10] The court affirmed that portion of the district court's opinion which concluded that the funds in the PA Fund associated with benefits guaranteed by Hancock were not "plan assets," and that Hancock was not an ERISA fiduciary with respect to those funds.

extent that the insurer engages in the discretionary management of assets attributable to that phase of the contract which provides no guarantee of benefit payments or fixed rates of return, it seems to us that the insurer should be subject to fiduciary responsibility. See 29 U.S.C. § 1002(21)(A).

P.A. 10. (emphasis added).

SUMMARY OF ARGUMENT

ERISA is a comprehensive statute designed to protect employee pension benefits. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, *reh'g denied*, 448 U.S. 908 (1980). In order "to ensure that employee pension expectations are not defeated," ERISA established a variety of protective rules, including fiduciary standards for pension plan managers. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 n.5 (1981). The fiduciary rules impose a high standard of care and prudence on persons who exercise authority or control over the management or investment of pension plan assets. 29 U.S.C. §1104.

Insurance companies, like any other individual or entity which exercises authority or control over the management or investment of pension plan assets, are subject to the fiduciary standards of ERISA. Congress recognized, however, that the fiduciary protections afforded to pension plans and their participants are not necessary to the extent that an insurer has assumed the investment risk with respect to pension plan assets. Thus, in §401(b)(2) Congress provided a narrow exception to the application of the fiduciary rules of ERISA.

The Second Circuit correctly relied upon the plain meaning of the language adopted by Congress and the applicable legislative history in reaching its conclusion that Hancock is a fiduciary with respect to GAC 50's "free funds." By including within §401(b)(2)(B) the limiting phrase "to the extent," Congress clearly intended to create safe harbor treatment only for that portion of an insurance policy or contract providing benefits "the amount of which is guaranteed by the insurer." 29 U.S.C. §1101(b)(2). This language restricts §401(b)(2)'s exemption to

those plan assets actually used to purchase a fixed amount of guaranteed benefits, and not, as Hancock and *amici* claim, to plan assets which may at some future date be used to purchase an indeterminate amount of guaranteed benefits. The language of §401(b)(2) compels the conclusion that Congress chose to apply ERISA's fiduciary rules to investment managers, including insurance companies, when their investment of plan assets produced variable benefit payments to beneficiaries *or* a variable investment return to a plan.

The Second Circuit's decision is supported by the well-reasoned decision of the Seventh Circuit. *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 327 (7th Cir. 1983) ("*Peoria*"). Relying on established precedents of this Court and the plain language of the Act, the Seventh Circuit's interpretation of §401(b)(2) gives effect to the obvious intent of Congress to provide a limited exemption for funds associated with guaranteed benefits.

The legislative history also makes clear that the test for determining fiduciary status is not solely whether pension funds are held by an insurer in its general account or in a separate account. On the contrary, the Conference Committee rejected explicit language which would have immunized all general account contracts from ERISA's fiduciary rules. Instead, the appropriate test is whether the investment risk has been assumed by the insurer, or whether the investment risk, as here, remains with the Plan. In addition, Hancock and *amici*'s claims to the contrary notwithstanding, ERISA's legislative history makes clear that Congress anticipated the disruptions that the statute would cause in the insurance industry.

The position advanced by the DOL is misguided. The DOL has ignored the language of the statute as well as Congress's mandate to construe exemptions to its remedial provisions narrowly. Moreover, the DOL's claims that it has taken a consistent position with respect to this issue and that the insurance industry developed "settled expectations" as a result are simply not borne out by the record. From its "Interpretive Bulletin 75-2 Relating to Prohibited Transactions" and various Advisory Opinions issued

over the years, through the issuance of the Plan Asset Regulation in 1986, and climaxing in the DOL's refusal to file a brief on this issue when requested to by the court below, the DOL has often supported the Trustee's position or, at the very least, acted inconsistently.

In order to escape the clear language of ERISA and the obvious intent of Congress, Hancock and *amici* claim that conforming to both state law and ERISA fiduciary rules would be impossible. These claims are irrelevant and, in any event, do not bear scrutiny. The issue before this Court is the interpretation of §401(b)(2), not its implementation. The proper forum for the debate on how best to regulate general account products under ERISA is the DOL's regulatory process. At that time, issues concerning class exemptions from the prohibited transaction rules, the previous experience with insurance company pooled separate accounts and the usefulness of segmentation can be weighed on a full record.

Finally, Hancock and *amici* claim that to the extent ERISA brings certain general account contracts within its reach, ERISA is pre-empted by state law. The DOL properly rejects this theory. Neither ERISA's Savings Clause nor the McCarran-Ferguson Act assist Hancock. The law is clear: where state insurance law and ERISA do not conflict, insurers are subject to dual regulation; where the two collide, ERISA alone survives.

ARGUMENT

I.

SECTION 401(b)(2) REQUIRES A HOLDING THAT HANCOCK IS AN ERISA FIDUCIARY WITH RESPECT TO THE FREE FUNDS IT HOLDS UNDER GAC 50

A. *The Plain Language and The History of §401(b)(2)(B) Support The Second Circuit's Interpretation*

> [A] person is a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management of

> such plan or exercises any authority or control respecting management or disposition of its assets . . . .

29 U.S.C. §1002(21)(A). Hancock's status as a fiduciary turns upon whether pension funds invested in its general account — as to which Hancock unquestionably exercises sufficient control and authority to render it a fiduciary— are "plan assets" under ERISA. Although not defined in the statute, the scope of "plan assets," so far as is relevant here, is evident from the statutory scheme. But for §401(b)(2)'s "safe harbor," pension funds invested in insurance company contracts like GAC 50 would remain plan assets subject to ERISA's fiduciary rules. *Peoria*, 698 F.2d at 326.

Section 401(b)(2) provides a limited exception from ERISA's fiduciary rules for insurance companies that issue "guaranteed benefit policies":

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of the insurer.

29 U.S.C. §1101(b)(2). Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract *to the extent that* such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. §1101(b)(2)(B) (emphasis added).

Hancock and *amici* contend that §401(b)(2) exempts all general account contracts from ERISA's fiduciary rules.[11] Hancock at 13; ACLI at 3; LICONY at 11; NYMA at 8; U.S. at 13. This interpretation has no support in the language of the statute. Such an interpretation finds support only in the Senate bill which explicitly exempted *all* assets held in general accounts from

[11] Under ERISA all pension plan assets held in separate accounts are "plan assets" and therefore subject the insurance company to ERISA's fiduciary duty provisions. *See* 29 U.S.C. §1101(b)(2)(B).

ERISA's fiduciary duty provisions.[12] This early draft provision, however, was deleted by the Conference Committee and replaced by the more limited "guaranteed benefit" exemption. 29 U.S.C. §1101(b)(2). The only rational interpretation of the Conference Committee's rejection of the Senate's explicit exemption for general account assets is that it intended a different result. The Conference Committee compromised between the Senate's total exemption and the House's lack of any exemption by taking the intermediate position reflected in §401(b)(2)(B).[13]

In sum, the language and history of §401(b)(2) demonstrate that Congress did not intend to establish a blanket exemption for all assets held in insurers' general accounts. Rather, Congress intended to distinguish between pension funds supporting "guaranteed benefits" and all other pension monies held by insurance companies.

B. *"To The Extent" Is A Term of Limitation Which Must Be Given Effect In Interpreting §401(b)(2)(B)*

The critical phrase in §401(b)(2)(B) is "to the extent," a phrase that is also found in ERISA's definition of fiduciary. 29 U.S.C. §1002(21)(A). As this Court has stated, "language used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute . . . ." *Mertens v. Hewitt Associates*, No. 91-1671, 1993 U.S. LEXIS 3742, at *20 (June 1, 1993); *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

ERISA defines persons as fiduciaries only "to the extent" that they engage in certain activities. 29 U.S.C. § 1002(21)(A).

[12] The Senate bill provided that the fiduciary provisions would not apply to "funds held by an insurance carrier unless that carrier holds funds in a separate account." S.4, 93d Cong., 1st Sess. §511 (1973), reprinted in, 1 Legislative History of ERISA at 170 (Comm. Print 1976).

[13] Courts have long recognized that "statutes are frequently the product of compromise, and a legislative compromise would be undone if a court enforced the maximum position of one of the negotiating factions." *Harmon v. Teamsters*, 832 F.2d 976, 979 (7th Cir. 1987), *citing Rodriguez v. United States*, 480 U.S. 522 (1987). Hancock and *amici* ask this Court to enforce the Senate position, when the enacted language shows clear evidence of a compromise.

Numerous circuit courts, in defining the scope of the fiduciary definition, have interpreted the phrase "to the extent" as one of limitation.[14] "[T]he inclusion of the phrase 'to the extent' in §1002(21)(A) means that a party is a fiduciary only as to the activities which bring the person within the definition. The statutory language plainly indicates that the fiduciary function is not an indivisible one." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d at 61. The phrase "to the extent" thus creates a division between a single entity's functions — those which give rise to fiduciary obligations and those which do not.

Section 401(b)(2)(B) demands the same approach. A contract or policy of insurance is divisible and is only exempt from ERISA's fiduciary duty provisions "to the extent" it "provides for benefits the amount of which is guaranteed by the insurer." GAC 50 clearly is not a "guaranteed benefit policy" with respect to the free funds Hancock holds under the contract. Indeed from 1977 to 1982, those funds were used to pay "*non-guaranteed benefits*," a term coined by Hancock and used in the contract (J.A. 241).

The substitution by the district court and Hancock of the word "if" for the phrase "to the extent" improperly eliminates this important limitation from §401(b)(2)(B). *See Harris I*, P.A. 57 ("Congress did not intend to hold an insurer to a fiduciary duty *if* the contract . . . provides for fixed benefits to the plan beneficiary.") (emphasis added).[15] A similar substitution of "if"

[14] *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir. 1992), *cert. denied*, 1993 U.S. LEXIS 929 (1993); *Belade v. ITT Corp.*, 909 F.2d 736, 738 (2d Cir. 1990); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624 (9th Cir. 1990); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250 (2d Cir. 1987); *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enter., Inc.*, 793 F.2d 1456, 1459, *reh'g denied*, 797 F.2d 977 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984); *see also* 29 C.F.R. §2509.75-8 (D-4) (1992).

[15] Hancock reorders the syntax of §1101(b)(2) and omits any language of limitation, in the process changing its meaning to achieve the same result. *Cf.*

(Footnote continued)

for "to the extent" in §3(21)(A) would render invalid all of the decisions cited above. Clearly, neither result was intended by Congress. The statute only gives safe harbor "to the extent that such policy or contract provides for benefits the *amount of which is guaranteed* by the insurer." 29 U.S.C. §1101(b)(2)(B) (emphasis added).[16]

The DOL argues that "to the extent" was intended to distinguish between fixed and variable annuities sold from general accounts. U.S. at 20. Aside from the absence of any support for this interpretation in the statute, the insurance industry does not (and did not in 1974) sell variable annuities from general accounts. In fact, relevant state law forbids the sale of variable annuities from general accounts. *See* Hancock at 19, n. 30, 20, n. 31; ACLI at 11-12, n. 16. The DOL thus relegates §401(b)(2) to the realm of a statutory exemption aimed at a practice which did not exist at the time, and which is forbidden under state insurance laws.[17]

Hancock at 4 ("In section 401(B)(2) . . . Congress expressly declared that an insurer's assets held under a 'policy or contract that provides for benefits the amount of which is guaranteed by the insurer' are not plan assets").

[16] The construction of "to the extent" argued by Hancock and the *amici* would also run counter to the insurance guaranty schemes of New York and Massachusetts. Massachusetts explicitly excludes from its guaranty law's protection

> any annuity contract or group annuity certificate that is not issued to and owned by an individual, except *to the extent* of any annuity benefits guaranteed to an individual by the insurer under any such contract or certificate.

Mass. Ann. Laws, ch. 175, §146(B)(4)(B)(2)(C) (Law Co-op. 1993) (emphasis added); *see also* N.Y. Ins. Law §7703(b)(2) (Consol. 1993). Under Hancock's reading of "to the extent," because GAC 50 *permits* the purchase of additional guaranteed benefits, the entire contract would be entitled to the protection of the Massachusetts guaranty law. Such a reading of the phrase, however, obviously distorts the intention of the Massachusetts legislature, as it does that of Congress.

[17] In defense of this obviously flawed reading of the statute, the DOL contends that "there is no inherent reason why general account contracts could not provide for the payment of variable annuities instead." U.S. at 20. But in fact there is: "[O]nly fixed benefit payments may be made from an insurer's general account. New York law permits the payment of variable benefits, but only from a separate account." NYMA at 4, n.3

C. *With Respect To Its Free Funds, GAC 50 Does Not "Provide For" Benefits the Amount Of Which Is Guaranteed*

Contrary to the Third Circuit's reasoning in *Mack Boring & Parts Co. v. Meeker, Sharkey & Moffitt*, 930 F.2d 267 (3d Cir. 1991) ("*Mack Boring*"), and that of Hancock and *amici*, GAC 50 is a hybrid contract, containing both guaranteed and non-guaranteed elements. Simply because the Trustee could have used the contract's "free funds" to purchase additional "guaranteed benefits" does not render the contract "guaranteed" in its entirety. *See* Hancock at 26-27; U.S. at 16-17, 19; ACLI at 19. If sustained, this argument would immunize *all* general account contracts, because virtually all contain some provision for future guarantees in order to comply with state regulations. By Hancock's and *amici*'s reasoning, all an insurance company need do to immunize itself from ERISA is to include in all of its pension investment offerings an annuity purchase option, at a price to be determined by the insurance company at the time of the exercise of the option. Thus, the insurers would have the benefit of §401(b)(2) without assuming any risk.

The language of §401(b)(2), however, conflicts with this facile interpretation: even though GAC 50 may have an optional purchase provision, the *amount* of benefits which might at some future date be guaranteed by Hancock is unpredictable, and depends solely upon Hancock's skill as an investor. The only benefit payments "the *amount* of which is guaranteed by [Hancock]" are those benefits guaranteed under GAC 50 prior to its amendment in 1977. GAC 50 is a guaranteed benefit policy only as to those guaranteed benefits.

Moreover, it is clear from its brief that the DOL misunderstands a critical feature of GAC 50: with respect to GAC 50's free funds, Hancock did not " 'provide[] *a guaranteed price structure* that the employer can unilaterally decide to take advantage of at any time that it feels the probable future course of investment, mortality, and expense risks will be such that it will be to its advantage to shift the risk to the life insurance company.' " U.S. at 15, *quoting* K. Black & H. Skipper, *Life*

Insurance, at 497 (11th Ed. 1987); *see also* Hancock at 10. While the contract contains provisions permitting the Trustee to request further guaranteed benefits, Hancock had the option to unilaterally change the price for such annuities at any time after 1972.[18] Thus, a linchpin of the DOL's reasoning is simply incorrect.

By accepting Hancock's and the ACLI's mischaracterization of GAC 50 as a contract in which "substantial risk" has been shifted, at least potentially, to Hancock, the DOL has ignored or misunderstood the realities of this form of investment vehicle. In fact, the only reason that an optional guaranteed purchase provision still appears in GAC 50 is that Hancock stated that such a provision was necessary to meet the requirements of Massachusetts law (S.C.A. 1105-06, ¶ 9; S.C.A. 1243).[19] Professor McGill also acknowledges that optional purchase provisions in IPG contracts like GAC 50 are no more than a "pretense." D. McGill & D. Grubbs, *Fundamentals of Private Pensions* 564 (6th Ed. 1989); *see also id.* at 492.[20]

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[18] When GAC 50 was amended in 1968, the contract established a rate for purchases of additional guaranteed benefits for five years, or until 1972. After 1972, Hancock had the unilateral right to modify the rates in the contract (J.A. 90, ¶ 39).

[19] Hancock's own expert, William Dreher, explained more broadly the phenomenon of optional guaranteed benefit purchase provisions being required in investment contracts:

> [T]here is a legal necessity that the contract qualify as a product that is offered by an insurance company under the applicable state laws, but . . . the principal business purpose being achieved by the buyer relates to an assumption about the . . . success of the insurance company's management of those plan assets.

S.C.A. 595-96.

[20] The Insurance Commissioners' position does not reflect the current realities of these types of contracts. They contend that, "fundamentally, purchasers of insurance company group annuity contracts are purchasing insurance products that guarantee the payment of retirement benefits to plan participants . . . . They are not, and have never been, purchasing an investment advisory service subject to federal regulation." NYMA at 20. This statement cannot be reconciled with the facts, nor with New York's and Massachusetts's refusal

(Footnote continued)

The DOL's adoption of Hancock's and the ACLI's position also ignores this Court's analysis of the hybrid nature of investment vehicles such as GAC 50. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967) ("*United Benefit*"). There, as here, the contract in issue contained an optional annuity purchase provision which permitted the purchaser to convert his interest in a separate account "Flexible Fund" into a life annuity. This Court concluded that, even with this feature and a "guarantee that a certain amount of fixed-amount payment life annuity will be available at maturity," the contract was an investment contract within the scope of the Securities Act, and not an exempt insurance contract. *Id.* at 206.

As this Court noted, the "fixed-payment benefits are adjusted to reflect the number of dollars available, as opposed to the conventional annuity where the amount available is planned to reflect the promised benefits." *Id.* at 208. Because the amount of "free funds" available in the event the Plan chose to purchase additional guaranteed benefits is entirely dependent on Hancock's investment performance, GAC 50 is in this respect no different than the contract under review in *United Benefit*. *See Peoria*, 698 F.2d at 327.

In short, to permit Hancock and other insurers to evade ERISA regulation of their activities as investment advisors through the pretense of optional annuity purchase provisions, with or without a "guaranteed" pricing structure, would eviscerate the fiduciary provisions of ERISA and should be rejected.

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to provide guaranty fund protection to the non-guaranteed portions of pension investments in general accounts. *See* N.Y. Ins. Law §7703(b)(2) (Consol. 1993); Mass. Ann. Laws ch. 175, §146(B)(4)(B)(2)(C) (Law Co-op 1993). Moreover, the claim that fixed rate annuities are fundamentally insurance products was squarely *rejected* in *In re New York State Association of Life Insurance Underwriters, Inc. v. New York State Banking Dep't*, No. 66903, 1993 N.Y. App. Div. LEXIS 5489 (June 3, 1993), at the behest of New York's Attorney General. In that case, New York successfully argued that such annuities are "*financial investment instruments* which are very similar in character to other financial instruments which banks are allowed to offer, including debt instruments and certificates of deposit." *Id.* at *6 (emphasis added).

D. *The Use of the Term "Benefit" in §401(b)(2) Supports the Second Circuit's Reading*

Hancock seeks to find significance in Congress's use of the term "benefits." Because the term "benefit" refers only to individual benefits paid to beneficiaries, Hancock claims ERISA's fiduciary rules are applicable *only* when benefits payable to plan participants and beneficiaries from insurance company general accounts are variable. Based on this flawed reasoning, Hancock concludes that the variable nature of GAC 50's investment return to the Plan is irrelevant, because benefit payments to retirees and beneficiaries already established under GAC 50 will not vary.

However, §401(b)(2) is not structured in the way that Hancock suggests. As the court below observed, the *only* funds entitled to safe harbor treatment are those securing guaranteed payments to beneficiaries. It follows, therefore, that *all* funds not associated with guaranteed benefits, whether used to provide variable benefit payments to beneficiaries *or* variable investment return to a plan, are not exempt. Unless the funds in issue are used to provide guaranteed benefits, narrowly defined, they are "plan assets" subject to ERISA's fiduciary rules.

This interpretation of §401(b)(2) is consistent with the long-held views of the DOL that the investment return to *plans* is as important as the return to beneficiaries. The DOL also has required that neither the beneficiary's nor the Plan's investment return be variable for the investment manager to escape fiduciary treatment. DOL Adv. Opinions 78-8A (March 13, 1978) (H.A. 104) and 83-51A (Sept. 21, 1983) (H.A. 110). *See* Point III, D below. The DOL correctly views plans as standing in the stead of participants and beneficiaries, who depend on the financial soundness of their plans to protect their benefits. U.S. at 22.

E. *ERISA's Treatment of Separate Accounts Does Not Support Petitioner's Contentions Regarding the Treatment of General Accounts*

Hancock and the ACLI argue, and the *Mack Boring* court surmised, that §401(b)(2) was designed by Congress to close a

"loophole" in the statute and ensure that a contract which permitted contributions to both the general account and separate accounts would be an exempt guaranteed benefit policy only "to the extent" that plan contributions were held in the general account. ACLI at 21-22; *Mack Boring*, 930 F.2d at 274. This reading, however, finds no support in the statutory language.

Section 401(b)(2)(B) does *not* state, as the ACLI would have it, that a policy or contract is a guaranteed benefit policy "except to the extent contributions are held in separate accounts" or "to the extent contributions are held in the general account." On the contrary, §401(b)(2) exempts only an insurance policy or contract "to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." Hancock's and the ACLI's argument is nothing more than a disguised attempt to revive the Senate bill's blanket exemption of all general account assets from ERISA's fiduciary provisions, an approach that was abandoned by the Conference Committee.

The ACLI contends that if the first sentence of §401(b)(2)(B) is interpreted as the Second Circuit held, then the second sentence would be unnecessary. ACLI at 20-21.[21] This is simply incorrect. A coherent reading of the statute suggests that the treatment by Congress of surplus in separate accounts is fully consistent with the Second Circuit's decision. Aside from the exemption for "surplus," pension funds held in separate accounts are always treated as plan assets under ERISA. This, of course, is consistent with Congress's purpose of requiring fiduciary compliance when pension plan investments are at risk.

The Second Circuit's reading of §401(b)(2)(B) does not render any portion of the language superfluous. While the first sentence of the subsection was designed to *limit* the exemption to that portion of a contract under which benefit payments were *guaranteed*, the second sentence was necessary to ensure that

[21] The second sentence of § 401(b)(2) provides that the term "guaranteed benefit policy . . . includes any surplus in a separate account, but excludes any other portion of a separate account." 29 U.S.C. §1101(b)(2)(B).

the insurance company's own "seed" money deposited in separate accounts would not be swept within ERISA's reach.[22] Furthermore, the second sentence clarifies that Congress did not consider any separate account arrangements to qualify as "guaranteed benefit policies." The ACLI, however, distorts this extremely limited concession into an exemption which would bring *all* general account contracts, whether or not *any* benefits are actually guaranteed, within its ambit.[23]

F. *Following a Long Line of Supreme Court Decisions, the Seventh Circuit Correctly Read §401(b)(2) As Exempting Annuity Contracts Only During Their Annuity Phase*

The Seventh Circuit has also concluded that §401(b)(2) is a narrow exception and cannot be read as a blanket immunity for insurance company general accounts. *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 327 (7th Cir. 1983). *Peoria* involved a general account

[22] The ERISA Conference Report makes this point clearly:

> [I]nsurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered plan assets (but need not be held in trust). However, to the extent that insurance companies place *some of their own funds* in these separate accounts to provide for contingencies, this separate account "surplus" is not to be subject to the fiduciary responsibility rules.

H. Rep. No. 1290, 93d Cong., 2d Sess. 296 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077 (emphasis added) ("ERISA Conf. Rep.").

[23] Surplus in separate accounts is fundamentally different from the "free funds" in GAC 50's PA Fund. Separate account "surplus" is the "seed money" invested by insurance companies to start separate accounts. ERISA Conf. Rep. at 5077; DOL Adv. Opinion 83-38A (July 22, 1983) (LEXIS, Labor library, ERISA file); U.S. at 18, n.10; *see also, e.g.*, N.Y. Ins. Law §4240(a)(3) (Consol. 1993). Such "surplus" is *not* created by the earnings of pension monies held in the separate account. Thus, separate account "surplus" is in no sense analogous to the free funds in GAC 50, which are the assets of the Plan, not of Hancock, and thus should be used as ERISA requires — for the benefit of Plan participants and beneficiaries. 29 U.S.C. §1104(a)(1)(A)(i).

deposit administration contract in which pension funds were deposited in a "DA Fund" and "commingled for investment purposes with the funds of other customers of the insurance company, in much the same way as investments of different investors are pooled in a mutual fund or common trust fund, in order to obtain diversification while minimizing brokerage and management costs." *Id.* at 322. Once an employee retired, annuities were purchased and the purchase price for such annuities was removed from the DA Fund account. The DA Fund no longer received the benefit of the insurer's investment experience on the funds so removed and no payments to beneficiaries were ever made from the DA Fund.

The Seventh Circuit held that while the funds in issue were kept in the DA Fund, the contract was in a variable accumulation phase and did not constitute a "guaranteed benefit policy" because the insurer had investment discretion and the results of that investment discretion would determine the amount of funds available to the pension plan:

> Congress did not want to make an insurance company that sells a standard annuity contract — one that provides "benefits the amount of which is guaranteed by the insurer" — a fiduciary toward the purchaser of the contract. But that is not what Penn Mutual sold here. The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to Penn Mutual to manage with full investment discretion, subject only to a modest income guaranty. If the pension plan had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act, and that is essentially what the trustees did during the accumulation phase of the contract with Penn Mutual.

Id. at 327.[24] *Accord Jacobson v. John Hancock Mut. Life Ins. Co.*, 655 F. Supp. 1290, withdrawn pursuant to settlement, 662 F. Supp. 1103, 1112-13 (D. Conn. 1987).

As Judge Posner's analysis in *Peoria* indicated, the decision by Congress to create a narrow exemption from ERISA's fiduciary rules for certain types of insurance contracts was hardly surprising. The Seventh Circuit relied on a long line of cases which analyze the realities of insurance contracts. In *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65 (1959) ("*VALIC*"), this Court had held that variable annuity contracts issued by insurance companies are "investment contracts" and not exempt "insurance contracts" under the Securities Act. Similarly, in *SEC v. United Benefit Life Insurance Co.*, this Court rejected an "all-or-nothing" analysis of an insurance contract with an optional fixed annuity purchase provision. 387 U.S. 202 (1967).

This Court concluded that an insurance company product could be broken down into investment and insurance

[24] Hancock attempts to distinguish *Peoria*, arguing that the Seventh Circuit's decision came in the context of a dismissal motion and not summary judgment, impugning the Court's analysis as "casual." Hancock at 25, n. 42. The *Peoria* decision is a reasoned and realistic analysis of the DA Fund contract following the precedents of this Court. Moreover, the Seventh Circuit has consistently adhered to Judge Posner's analysis; his approach continues to play a central role in the Seventh Circuit's analysis of the scope of §401(b)(2). *See, e.g., Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 568 (7th Cir. 1991) (Easterbrook, J.), *cert. denied*, 112 S. Ct. 1182 (1992) (contract held to be a "guaranteed benefit policy" where investment return announced in advance and guaranteed by the insurer).

The DOL also attempts to distinguish *Peoria*, contending that, under the contract there in issue, "the plan bore the entire investment risk . . ." U.S. at 15, n. 8. In fact, the *Peoria* and *Mack Boring* contracts are the same — both were deposit administration contracts with accumulation and annuity phases. *Compare Peoria*, 698 F.2d at 322-23 *with Mack Boring*, 930 F.2d at 268-69. Although GAC 50, as an immediate participation guarantee contract, takes a slightly different form, in all three contracts the amount available to the pension plan to purchase annuities is solely dependent on the insurance company's skill in investing plan assets during the accumulation phase. Moreover, Hancock has repeatedly stated that the Plan is also "on the risk for the plan experience" under GAC 50 (S.C.A. 271, 285, 293, 316, 333, 350, 366, 382, 399, 428). Again, the DOL's position is based on an incorrect understanding of the contracts at issue.

components, and that, in the "accumulation" phase, the contract in issue was a non-exempt investment contract under the Securities Act:

> First, we do not agree with the Court of Appeals that the "Flexible Fund" contract must be characterized in its entirety. Two entirely distinct promises are included in the contract and their operation is separated at a fixed point in time.

United Benefit, 387 U.S. at 207.

The Court also provided a basis for distinguishing between the insurance and investment aspects of contracts like GAC 50. After analyzing the role of an insurer in pricing and establishing a conventional annuity, the Court noted the distinct difference in the role an insurance company assumes during the accumulation phase:

> The "Flexible Fund" program completely reverses the role of the insurer during the accumulation period. Instead of promising to the policyholder an accumulation to a fixed amount of savings at interest, the insurer promises to serve as an investment agency and allow the policyholder to share in its investment experience.
>
> . . . .
>
> The fixed-payment benefits are adjusted to reflect the number of dollars available, as opposed to the conventional annuity where the amount available is planned to reflect the promised benefits.

Id. at 208. This Court also recognized that the test for determining whether an insurance company product is an "investment contract" or an insurance policy is

> what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act [such as the Securities Act] it is not inappropriate that promoters' offerings be judged as being what they are represented to be.

Id. at 211, *quoting SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943).

In assessing whether GAC 50 is in its entirety a "guaranteed benefit policy," the "character given the instrument" by Hancock and the insurance industry is highly relevant. Hancock's own marketing materials and one of its experts characterized IPG contracts like GAC 50 as "investment vehicles." S.C.A. 273, 591-92. According to Hancock's own expert, "investment vehicle" is "a trade term that is used by insurance companies [in selling contracts such as GAC 50] in their efforts to induce pension plan sponsors to do business with them, on the grounds that they will be able to deliver the type of investment strategy or desirable investment result in competition with other providers of investment services." S.C.A. 595. The investment performance of insurance companies is critical to pension plans such as GAC 50 because the pension plan bears all the investment risk with respect to the non-guaranteed portion of the contract. *See, e.g.*, S.C.A. 428.

Although Hancock made certain promises as an "insurer" with respect to GAC 50's guaranteed benefits, its sole role with respect to the "free funds," that is, the accumulation phase of the PA Fund, is as an investment advisor. Indeed, Hancock repeatedly has stated that the Plan is "on the risk for the plan experience." (S.C.A. 271, 285, 293, 316, 333, 350, 366, 382, 399, 428). While the Plan could request that "free funds" be used to purchase further "guaranteed benefits" – at a price, after 1972, within Hancock's sole discretion – these "fixed-payment benefits [would be] adjusted to reflect the number of dollars available, as opposed to the conventional annuity where the amount available is planned to reflect the promised benefits." *United Benefit*, 387 U.S. at 208. Thus, while the Plan may be free to purchase "guaranteed" benefits in the future, the *amount* of such benefits is *not* guaranteed.

The reasoning of this Court in *VALIC* and *United Benefit* consistently has been followed by the courts in analyzing insurance company products under the federal securities laws. *See, e.g, Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127 (1986), *as amended on rehearing*, 814 F.2d 1130, 1141 (7th Cir. 1987), *cert. denied*, 486 U.S. 1026 (1988). It can be presumed that

Congress was aware of *United Benefit* and its progeny when ERISA was enacted and intended to incorporate this analysis by using the term "insurance policy or contract" in the definition of "guaranteed benefit policy." *See* 29 U.S.C. §1101(b)(2)(B).

G. *The Interpretation of §401 Proffered By Hancock and* Amici *Violates Basic Canons of Statutory Construction*

The interpretation of §401(b)(2) advanced by Hancock and *amici* violates basic canons of statutory construction. First, their construction contravenes the precept that courts should avoid an interpretation of a statute if it "render[s] any part of it superfluous and does not give effect to all of the words used by Congress." *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir. 1987); *see Meloy v. Conoco, Inc.*, 817 F.2d 275, 279 (5th Cir. 1987). The interpretation proffered by Hancock and *amici* renders the phrase "to the extent" meaningless and superfluous.

Second, Hancock's and *amici*'s strained interpretation of §401(b)(2)(B) contravenes the principle that, in construing comprehensive remedial legislation such as ERISA, exceptions must be narrowly construed. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614, n.33 (1981). ERISA's legislative history explicitly adopts this rule. S. Rep. No. 127, 93d Cong., 1st Sess. at 18, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4854 ("It is intended that coverage under the Act be construed liberally" and "exemptions should be confined to their narrow purpose.")

Unlike Hancock and the ACLI, the DOL does not contend that §401(b)(2) unambiguously exempts all general account contracts from the reach of ERISA's fiduciary provisions. The DOL instead has taken the position that the provision in issue is ambiguous, and acknowledges that the Second Circuit's construction of the exemption "finds support in the statutory text and has some advantages as a matter of policy." U.S. at 12. Nevertheless, ignoring the rule that exceptions to ERISA must be narrowly interpreted, the DOL argues that a broader construction of the exemption should be adopted in order to avoid upsetting the allegedly "settled expectations" of the insurance industry. U.S. at 13. As demonstrated below, the DOL's contentions as to

the "settled expectations" of the insurance industry are belied by the record. *See* Point III, below.

Third, Hancock's construction of the guaranteed benefit policy exemption violates the familiar precept that

> "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Russello v. United States, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). In §401(b)(1), Congress explicitly exempted *all* pension funds invested in mutual funds from ERISA's fiduciary standards. That section reaches "*any* security issued by an investment company registered under the Investment Company Act of 1940." 29 U.S.C. §1101(b)(1). By contrast, §401(b)(2)(B) is narrower and particularized. Congress, perfectly capable of drafting a broad exclusion, chose not to in §401(b)(2)(B).

Hancock appears to argue that sections 401(b)(1) and 401(b)(2) should be construed in the same way, as wholly exempting investments in both mutual funds and general account contracts. Hancock at 16, 21, n. 33; ACLI 14-15. Hancock would have this Court ignore the specific limiting language of §401(b)(2)(B), which obviously has no counterpart in the mutual fund exemption. Congress's expressed rationale for §401(b)(1) was that mutual funds, already subject to federal regulation, should be exempt from ERISA's fiduciary rules. ERISA Conf. Rep., *reprinted in* 1974 U.S.C.C.A.N. at 5077. No similar statement or rationale can be found to support the idea that Congress proposed to adopt a broad exemption for general account contracts.[25]

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[25] Hancock is forced to turn to a DOL discussion of an early version of the Plan Asset Regulation, *which was withdrawn* by the DOL, to find a similarly broad expression of the alleged rationale for §401(b)(2). *See* discussion at Point III, C below. In addition, as demonstrated by the *Harris II* decision, summarily dismissing all of the Trustee's state law claims, there is no similarity between SEC regulation of mutual funds and state regulation of general accounts.

II.

ERISA'S LEGISLATIVE HISTORY FULLY SUPPORTS THE SECOND CIRCUIT'S INTERPRETATION OF §401(b)(2)(B)

The legislative history of §401(b)(2) clearly reflects Congressional intent to apply ERISA's fiduciary rules to insurance companies where the investment of plan assets in insurance companies will result in variable investment return. The legislative history also indicates that Congress was aware that its decision would upset accepted insurance company practices, and that Congress included measures within the statute designed to ameliorate the adverse impact of ERISA on the way insurance companies had previously done business.

A. *The Conference Report Demonstrates Congress's Intention to Carve Out a Narrow Exception for Guaranteed Benefits*

The legislative history of §401(b)(2)(B), though relatively sparse, provides significant support for the Second Circuit's interpretation of the statute. The Conference Report unmistakably recognized that a single policy may be separated into guaranteed and non-guaranteed portions for the purpose of determining which funds constitute plan assets:

> If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then *the variable part of the policy and assets attributable thereto* are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

ERISA Conf. Rep., *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077 (emphasis added).[26]

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[26] The Conference Report further states:

> To the extent that plan assets are held by an insurance company they need not be held in trust. However, to the extent the substitute treats assets held by an insurance company as "plan assets" the insurance company is to be treated as a fiduciary with respect to the plan, and is to meet the fiduciary standards of the conference substitute.

(Footnote continued)

As the DOL acknowledges in its brief, "The Conference Committee's use of the word 'payments' rather than 'benefits' and its reference to the 'variable part of the policy' make more plausible the court of appeals' inference that Congress was thinking of payments to plans rather than payments to plan beneficiaries . . . ." U.S. at 21. Moreover, the Conference Committee's use of the word "benefits," and not "payments" in the statute does not assist Hancock. *See* Hancock at 24, n.40; U.S. at 21. Congress's use of the narrower term "benefits" indicates a purpose to narrowly confine the exemption afforded by §401(b)(2), *i.e.*, the exemption is applicable only to "benefits the amount of which is guaranteed by the insurer," while all other aspects of the contract, including variable payments to beneficiaries *or plans*, are to be governed by ERISA's fiduciary rules.

Furthermore, the Conference Committee's decision to reject the Senate's blanket exemption for general account contracts shows that it "intended to accomplish a different result." U.S. at 20. The Senate bill provided that the fiduciary provisions would not apply to "funds held by an insurance carrier unless that carrier holds funds in a separate account." S.4, 93d Cong., 1st Sess. §511 (1973), *reprinted in* 1 Legislative History of ERISA at 170 (Comm. Print 1976).[27] "Where Congress includes limiting

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ERISA Conf. Rep. at 5079. When coupled with the Conferees' earlier statement with respect to the guaranteed benefit policy exemption and the failure to refer to general or separate accounts, there can be little doubt that Congress envisioned circumstances where insurers would be deemed fiduciaries with respect to general account contracts.

[27] Hancock and the insurance industry have argued in the court below and elsewhere that a footnote in a "staff summary" stating that the intent of the House and Senate bills was the same justifies ignoring the different language chosen by the Conference Committee. *See, e.g.*, Goldberg & Altman, "The Case for Nonapplication of ERISA to Insurers' General Account Assets," 21 Tort & Ins. L.J. 475 (1986) (the authors are members of the ACLI's Fiduciary Task Force). Apart from the fact that this argument stretches "legislative history" beyond credulity, this Court has dealt with this same issue in connection with the preemption, savings and deemer clauses of ERISA, all of which changed drastically from their original incarnations in the House and Senate bills to their final form in the statute. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 745 (1985); 29 U.S.C. §1144. This Court did not then, nor should it now, interpret the statutory language to mean the same thing as the radically different language that appeared in the original bills.

language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

The DOL says that the legislative history of §401(b)(2)(B) "does not shed light on what motivated the Conference Committee to rewrite the provision," and candidly acknowledges that it is guessing as to the "probable" goal Congress intended to accomplish with §401(b)(2)(B). U.S. at 20-21. As with the *Mack Boring* court, however, the DOL's interpretation dramatically expands the scope of the exemption, while ignoring the actual language chosen by Congress, and grants safe harbor protection to *all* general account contracts — whether or not they actually provide *any* fixed benefit payments — so long as they do *not* provide for variable benefit payments.

The DOL speculates that

> it is probable that Congress intended to accomplish only a rather modest tightening of the Senate proposal. Specifically, we believe that Congress most likely adopted the language in the definition of "guaranteed benefit policy" in Section 401(b)(2) in order to close a potential loophole that might have permitted insurers to avoid fiduciary responsibility while offering general account contracts that provided variable benefits to plan participants.

U.S. at 20. However, the "potential loophole" that the DOL claims that Congress may have intended to close — the sale of variable annuities from general accounts — is and since 1974 has been illegal under the laws of all fifty states. Hancock at 17, 19, n.30, 20, n.32; ACLI at 9, n.8, 11; NYMA at 4, n.3 ("only fixed benefit payments may be made from an insurer's general account.").

The DOL in essence postulates that §401(b)(2) was designed to address a problem which *did not exist* at time of the statute's enactment. Moreover, its divination of Congressional purpose,

finding no support either in statutory text or legislative history, is too speculative to be granted deference.[28]

B. *The Conference Report Makes Clear That Congress Understood That ERISA Would Require Substantial Changes In The Way Insurance Companies Do Business With Pension Plans and Pension Monies*

Hancock and *amici* argue at length that the legislative history contains no evidence that Congress recognized the disruptions which were likely to follow from application of §401(b)(2) to general accounts. Hancock at 33-35; U.S. at 21-22, 30; ACLI at 25. *See also Mack Boring*, 930 F.2d 267, 275 n.17 (3d Cir. 1991). This claim is refuted by the Conference Report:

> The Committee is aware that there exist *various established and recognized practices which are accepted in* commercial banking, trust and *insurance companies*, investment companies and other advisors in connection with employee benefit plans. However, notwithstanding current acceptance of such practices, the Subcommittee has found it difficult to establish definitive criteria concerning those practices which should be specifically proscribed. This difficulty was weighed . . . against the overriding need to protect workers' pension funds, and [the Committee] concluded that the latter's interest out-weighed any current attempt to define all practices and relationships which constitute not only actual but real potential threats to the security and preservation of the pension funds.

S. Rep. No. 127, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4868 (emphasis added).

In keeping with this recognition, Congress undertook to lessen the burden upon insurance companies and others by providing lengthy transition periods and administrative procedures

[28] *See Mertens v. Hewitt Associates*, No. 91-1671, 1993 U.S. LEXIS 3742, at *9 (June 1, 1993); *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

pursuant to which affected parties can obtain relief. *See* 29 U.S.C. §§ 1108, 1114.

> [T]he Secretary of Labor is authorized by the Act to waive any proscribed practice as long as it is consistent with the purposes of the Act and determined to be in the interests of pension plan participants. *The Committee is not unaware of the possible impact of these prohibitions*, and accordingly has made provision in the bill for an adequate transition period of 3 years, or longer, if warranted.

S.Rep. No. 127, 93d Cong. 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4868 (emphasis added); *see also* ERISA Conf. Rep., *supra*, at 5089-90 ("The conferees recognize that some transactions which are prohibited . . . nevertheless should be allowed in order not to disrupt the established business practices of financial institutions . . . consistent with adequate safeguards to protect employee benefit plans.").

In light of the many statements in the legislative history acknowledging the significant changes in insurance industry practices that would be required, Congress's failure to specifically enumerate each change is neither remarkable nor significant.[29]

[29] Ignoring the clear evidence of legislative intent, the ACLI relies upon *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), for the proposition that Congress did not intend to impose fiduciary status "when to do so would result in dual loyalties." ACLI at 24, n. 27. The primary basis in that case for the court's conclusion that an Insurance Superintendent fulfilling a statutory duty to liquidate an insurer is not an ERISA fiduciary was the court's recognition that the Superintendent "cannot be said to have exercised *discretionary* control over [an ERISA plan] when he was acting under a *statutory duty* to liquidate the assets of [the insurer] and cancel all of [the insurer's] outstanding contracts *as mandated* by the state court order of liquidation." *Levy*, 635 F.2d at 968 (emphasis added). Moreover, because the "plan" in *Levy* was unfunded, the court concluded that there were no "plan assets" as to which the Superintendent could be deemed a fiduciary. The other cases cited by the ACLI for this claim are equally inapposite.

III.

THE DEPARTMENT OF LABOR'S PRONOUNCEMENTS BELIE ANY NOTION OF SETTLED EXPECTATIONS; NO DEFERENCE IS DUE THE DEPARTMENT'S INTERPRETATION OF §401(b)(2)

The DOL contends before this Court that its consistently held position has been that ERISA's fiduciary rules do not apply to any general account contracts sold by insurance companies. In fact, the DOL has vacillated on this issue since ERISA's enactment. In any event, its current position is unsound.

A. *The DOL's Position is Not Entitled to Deference From This Court*

The DOL argues that this Court should defer to its interpretation of the term "guaranteed benefit policy." The DOL's interpretation, however, is not entitled to such deference, for several reasons.

First, as discussed previously, the DOL's interpretation of §401(b)(2) cannot be squared with the statutory language.[30] *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference"); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

Second, even if this Court determines that § 401(b)(2) is ambiguous, the DOL's interpretation is not entitled to deference because it effectively renders the "to the extent" language of the statute a nullity, given the DOL's professed belief that all general account contracts containing optional annuity purchase provisions are exempt from ERISA's fiduciary rules. "Where an agency's

[30] One district court has correctly pointed out that if IB 75-2 was intended as a complete exemption for all general account contracts, it exceeded the DOL's authority because such an interpretation contradicts the plain meaning of the statute. *Jacobson v. John Hancock Mut. Life Ins. Co.*, 655 F. Supp. 1290, withdrawn pursuant to settlement, 662 F. Supp. 1103, 1110 (D. Conn. 1987).

interpretation would deprive a statutory provision of virtually all effect, a court should not affirm the agency's interpretation absent 'legislative history of exceptional clarity.' " *American Fed'n of Gov't Employees v. F.L.R.A.*, 798 F.2d 1525, 1529 (D.C. Cir. 1986), *quoting American Fed'n of Gov't Employees, Local 2782 v. F.L.R.A.*, 702 F.2d 1183, 1187 (D.C. Cir. 1983).

Third, the DOL's interpretation of §401(b)(2) is not entitled to deference because it clearly is a recently adopted position first espoused in this Court, and unsupported by prior regulations, rulings or administrative practices. *See* discussion at Sections B-D, below. The *post hoc* nature of the DOL's most recent position is demonstrated by its inability to accept the Second Circuit's invitation in this case to submit an *amicus* brief.[31] The DOL seeks to explain this failure by reference to the "complicated" facts[32] and statutory language which is "not crystal clear," and concedes that "subjecting general account assets to regulation under ERISA concededly would have some advantages for plan participants and beneficiaries." U.S. at 29, n.17. If, however, it had been the DOL's "consistent interpretation" of §401(b)(2) since 1975 that all funds invested in insurance company general accounts are not "plan assets," U.S. at 9, then presenting this position to the Second Circuit would have been a simple matter.

[31] The DOL initially accepted the invitation, stating:

> *The Secretary has not formulated a final position* on the issues presented by this case. Because of the case's importance and complexity, the Secretary needs more time to adequately examine the relevant statutes, regulations, and the legislative and regulatory history in order to reach a final conclusion.

See DOL Motion dated March 3, 1992, docketed March 5, 1992 (emphasis added); *see also* P.A. 3. However, at the end of a nearly three-month extension granted by the circuit court for the DOL to file its brief, the DOL declined the court's invitation, stating the "need to fully consider all of the implications of these issues within the Department precludes our providing the Court with a brief within a foreseeable time frame." P.A. 3.

[32] It has never been disputed by any party to this litigation that GAC 50 is a general account group annuity contract, and the parties long ago stipulated to its essential characteristics.

B. *The History and Scope of Interpretive Bulletin 75-2 Do Not Support the DOL's Interpretation*

In construing §401(b)(2), the DOL purportedly relies upon "Interpretive Bulletin Relating to Prohibited Transactions 75-2" ("IB 75-2"), an early DOL pronouncement regarding application of ERISA's Prohibited Transaction provisions.[33] Hancock and *amici* argue that IB 75-2 exempted general account contracts from all ERISA fiduciary duty rules and was not limited to prohibited transactions. Hancock at 38; U.S. at 11, 26-27; ACLI at 27-29; LICONY at 22, n.8.[34] However, as the Second Circuit pointed out,

> the preamble to the [Plan Asset] regulation recites that IB 75-2 was issued "with respect to whether a party in interest has engaged in a prohibited transaction with . . . a corporation or partnership . . . in which the plan has invested."

P.A. 13.[35]

Hancock and *amici* argue that the DOL could not and did not intend to make a distinction between prohibited transaction rules – §406 and §408 – and the general fiduciary rules – §404. *Compare* 29 U.S.C. §1104 and §§ 1106, 1108. The Second Circuit rejected this argument: "There is no inconsistency in considering

[33] 29 C.F.R. §2509.75-2(b) (P.A. 97) (orig. publ. Feb. 6, 1975, republished without change to paragraph (b) on Nov. 13, 1986, 51 Fed. Reg. 41262, 41280). IB 75-2 has never been published for notice and comment pursuant to the Administrative Procedure Act's rulemaking provisions and thus does not have the force of law. *See* 5 U.S.C. §553.

[34] Curiously, the broad language of IB 75-2 on its face goes well beyond even the DOL's current interpretation of §401(b)(2). If IB 75-2 was indeed intended, as the DOL now contends, to amplify upon the scope of §401(b)(2), it must be rejected since the Bulletin would exempt even a general account contract which provided for *variable* benefit payments. Thus, as construed by the DOL, IB 75-2 would undo even the "rather modest tightening" the DOL claims Congress "probably" intended in the final version of §401(b)(2). U.S. at 20.

[35] Discussing the differences between IB 75-2 and its final plan asset regulation, the DOL in 1986 stated that the plan asset regulation was broader because it determined the reach of all of ERISA's fiduciary responsibility requirements, not just the prohibited transaction rules. Final Regulation Relating to the Definition of Plan Assets, 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986).

certain assets to be plan assets for general fiduciary purposes but not for prohibited transaction purposes." P.A. 13.[36] The Second Circuit adopted the reasoning of *Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, in which the court rejected the contention that IB 75-2(b) grants issuers a complete exemption from ERISA:

> It seems perfectly consistent to this Court that plan assets might be considered such for purposes of general fiduciary duties, but not for purposes of the prohibited transactions rules. For example, without the policy stated in the bulletin, independent investment transactions between an insurer and large corporate employers who had purchased the insurer's general account products through a multiemployer plan could be deemed unlawful under §406 – even though there would be little, if any, chance that one employer could influence the insurer's investment decisions. Nevertheless, *it could still be sound statutory policy to subject the insurer to fiduciary duties more generally, while exempting it from the per se conflict-of-interest prohibitions of §406.*

729 F. Supp. 1162, 1184-85 (N.D.Ill. 1989), *aff'd*, 941 F.2d 561 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1182 (1992) (citations omitted) (emphasis added).

C. *The "Plan Asset" Regulation*

The history of the plan asset regulation, 29 C.F.R. §2510.3-101 ("PAR"), reveals that the DOL has never been convinced by the

[36] Nothing in the testimony of Mr. Fasser of the DOL, cited by Hancock and *amici*, contradicts the court of appeals' reading of the bulletin. In fact, Mr. Fasser's testimony focusses entirely upon prohibited transactions. *See also* Prohibited Transaction Class Exemption 75-1, 40 Fed. Reg. 50845 (Oct. 31, 1975) ("The fact that a transaction is the subject of an exemption granted under section 408(a) of ERISA . . . does not relieve a fiduciary of a plan to which the exemption is applicable from certain other provisions of ERISA, including . . . the general fiduciary responsibility provisions of §404 of ERISA which, among other things, require a fiduciary to discharge his duties with respect to the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA").

insurance industry that ERISA's general fiduciary responsibility provisions should not apply to insurance company general account assets.[37] The proposed PAR was more far-reaching than IB 75-2 because it governed not only prohibited transactions but also the issue of what constitutes a plan asset and thus who is a fiduciary under ERISA. 51 Fed. Reg. 41262 (No. 219 Nov. 13, 1986).

The 1979 proposal would have given the insurance industry substantial relief, but was withdrawn by the DOL in 1985 and no similar provision has since been promulgated by the DOL.[38] Proposed Regulation Relating to the Definition of Plan Assets, 50 Fed. Reg. 961 (1985). In early 1985, Hancock and three other insurance companies, obviously concerned about the *Peoria* decision, submitted their comments on the DOL's new PAR proposal, requesting that the DOL include an explicit statement that assets held in general accounts pursuant to contracts with ERISA-covered plans are not plan assets and thus managers of such assets

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[37] 29 C.F.R. §2510.3-101 (preamble published at 51 Fed. Reg. 41262 (No. 219 Nov. 13, 1986)). This regulation resulted from regulatory process which began in 1979. 44 Fed. Reg. 50363 (Aug. 28, 1979) (proposed as 29 C.F.R. §2550.401b-1). Following a notice and comment period, the DOL offered a new proposal. 45 Fed. Reg. 38084 (June 6, 1980). In January 1985, the DOL withdrew the 1979 and 1980 proposals and promulgated a new proposal. 50 Fed. Reg. 961 (Jan. 8, 1985). A notice and comment period and hearing were held on the 1985 proposal. In April 1986, Congress ordered the DOL to adopt final regulations defining plan assets by December 31, 1986. 29 U.S.C. §1135(d). On November 13, 1986, the DOL did so. 29 C.F.R. §2510.3-101 (1986).

[38] The 1979 proposal stated in relevant part:

> [I]n the case of a plan which is funded in whole or in part by a contract or policy of insurance issued by an insurer, the assets of the plan shall incude the contract or policy under which the benefits are insured but shall not, solely by reasons [sic] of the issuance of such contract or policy, include the assets of the insurer issuing the contract or policy except to the extent that such assets are maintained by the insurer in one or more separate accounts and do not constitute surplus in any such account.

Proposed Regulations Relating to the Definition of Plan Assets and to Establishment of Trusts, 44 Fed. Reg. 50363, 50366 (1979) (to be codified at 29 C.F.R. pt. 2550 (proposed Aug. 29, 1979)). In light of the DOL's withdrawal of the 1979 proposal, Hancock's reliance upon it is ironic. *See* Hancock at 37, n.53; LICONY at 20-21.

are not fiduciaries.[39] The DOL declined to do so. In November 1986, the DOL adopted the final PAR, stating only that it was leaving IB 75-2(b) undisturbed. 29 C.F.R. §2510.3-101 (1986). This statement, ambiguous at best, was hardly the endorsement the industry sought. *Cf.* Hancock at 38, n.54; ACLI at 29.[40]

D. *Department of Labor Advisory Opinions*

The Second Circuit noted that two other statements of the DOL support its holding concerning §401(b)(2). In both cases, the DOL looked behind the labels "general account" and "separate account" in order to determine whether the "guaranteed benefit" exception should apply. DOL Advisory Opinion 78-8A (March 13, 1978); DOL Advisory Opinion 83-51A (September 21, 1983). The court concluded that these advisory opinions supported the notion "that the free funds in GAC 50 are plan assets as to which Hancock is an ERISA fiduciary." P.A. 11.

Advisory Opinion 78-8A states in relevant part:

> when an insurance company provides investment advice which determines the rate of return to the plan and its participants, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary provisions of the Act.

H.A. 107. Advisory Opinion 78-8A also states that IB 75-2 "was not intended to modify or alter the basic statutory scheme of Section 401(b)(2) of the Act." *Id.* The court below found that this advisory opinion demonstrated the DOL's concern that ERISA's fiduciary responsibility provisions apply to investment vehicles

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[39] Letter of Lawrence J. Hass, Esq. to DOL Office of Regulations and Interpretation, Office of Pension and Welfare Benefit Programs, dated March 11, 1985. (S.C.A. 562).

[40] LICONY argues at length that the PAR exempts general accounts from ERISA. LICONY at 4, 21-27. However, as the DOL points out, the PAR does not apply to matters within the scope of IB 75-2(b). U.S. at 19, n. 11; 29 C.F.R. §2510.3-101 (1986). Moreover, the DOL is without authority to craft a different and broader exemption for guaranteed benefit policies than §401(b)(2) provides, whether under the guise of a regulation or an interpretive bulletin. Thus, the "operating company" and debtor/creditor analysis of the PAR cannot be used to immunize general accounts.

providing a variable rate of return to plans, and noted that, as to "at least one component of GAC 50, Hancock's investment performance clearly does affect the amount of funds available to the plan and its participants". P.A. 11.

DOL Advisory Opinion 83-51A states in part:

> a conventional separate account (which holds contributions received from a plan and provides for the crediting of income on such amounts based upon the investment experience of the separate account) would not be considered to be maintained in connection with a fixed contractual obligation of the insurance company merely because assets of the separate account are ultimately applied to provide fixed annuities to participants, and the assets of such a separate account should be considered to be plan assets.

H.A. 112. From this opinion, the court below concluded that the DOL "appears to take the position that 'plan assets' for the purpose of the fiduciary responsibility provisions of ERISA do not lose their status as such merely because the ultimate use of the account may be to provide fixed annuities, where the plan assets are affected by investment performance." P.A 12.[41]

IV.

THE INSURANCE INDUSTRY'S UNSUPPORTED CLAIMS OF IMPOSSIBILITY CANNOT ALTER THE STATUTE'S MEANING; THE TRUSTEE'S INTERPRETATION ADVANCES ERISA'S GOALS

To paraphrase this Court:

> [This Court should] decline [Hancock's invitation] to misread [ERISA] in order to reach a sympathetic result when such a reading requires [the Court] to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language. . ., and Congress is free to change it.

[41] The DOL attempts to distinguish this advisory opinion by pointing to the differences between the contract there in issue and GAC 50. *See* U.S. at 28. The reasoning set forth in that opinion, however, is equally applicable to an analysis of general account contracts such as GAC 50.

Mansell v. Mansell, 490 U.S. 581, 594 (1989).

The insurance industry claims that the plain language of §401(b)(2) should be ignored or distorted beyond recognition because the enforcement of the statute as drafted by Congress would wreak havoc on the way insurance companies do business. The record, however, is devoid of any evidence of such dire consequences. Moreover, no effort has been made by the industry, the DOL or Hancock to use existing practices and procedures to harmonize the requirements of ERISA with the way insurance companies conduct their business. The need for federal protection of plan assets invested in insurance companies is clear, and the statute reflects a decision by Congress to afford such protection to pension plans and beneficiaries, despite any resulting disruption of insurance company practices.

A. *The Insurance Industry's Claims of Impossibility Ring Hollow; The Implementation of This Court's Decision Should Be Left to the DOL*

The insurance industry, through Hancock and *amici* ACLI, LICONY and the Insurance Commissioners, argue that compliance with both state insurance law and ERISA is "impossible," and that, therefore, the statute cannot mean what it says.[42] Hancock at 28-29; NYMA at 5-6, 13, 21-26; LICONY at 14-17. Notably, however, the DOL does not support this claim. Instead, the DOL states that crafting regulations and exemptions would be "difficult" (U.S. at 10, 24-25). As discussed previously, however, Congress weighed and accepted the implications of its actions (See Conference Report discussed at Point II, B, above).

The issue before this Court is not how §401(b)(2) should be implemented, but how it should be interpreted. Upon a decision of this Court affirming the decision below, the DOL will be required to develop a workable scheme for compliance that takes into account the needs of both the insurance industry and workers and retirees. It is with respect to such implementation strategies that the DOL should be given deference.

[42] There is of course no factual basis in this record for these arguments, nor was there any when the same arguments were raised below and in the Third Circuit.

Moreover, procedures have long existed to ameliorate any burden imposed upon the insurance industry from dual regulation. For example, insurance companies are currently permitted under state law to "segment" their general account assets, allocating the investment income from specific assets to particular lines of business. The power of segmentation in general accounts to provide the administrative tracking and accountability already available to trusts and separate accounts is clear from the description of segmentation that follows:

> By [segmentation], the insurer can allocate general account assets to various lines of business or to defined classes of contract holders by merely setting up and maintaining memorandum accounts. The segmentation must be carried out and maintained on an equitable and consistent basis . . .
>
> *Segmentation is a powerful and flexible tool for asset management and allocation of investment earnings.* It permits the matching of assets and liabilities in a way not possible under other approaches. Assets can be segmented in ways to meet the differing investment objectives of various groups of contract holders.

D. McGill & D. Grubbs, *Fundamentals of Private Pensions* 502 (6th Ed. 1989) (emphasis added).

While Hancock ignores segmentation in its brief, the ACLI argues that, in its present form, segmentation is inadequate to accommodate all of the requirements of dual regulation under state law and ERISA. ACLI at 23. It is not clear why Hancock, which already has segmented its general account into a variety of segments, including two pension-related segments (J.A. 98, ¶88), could not now create an ERISA-covered segment. Rules concerning such a segment could be reviewed and approved by the DOL.[43]

[43] The insurance industry points out that segmentation is only used to allocate income and expenses associated with specified assets and liabilities but that no assets are actually allocated to particular segments. This is a fictional distinction for every purpose except upon the insolvency of the insurance company. Under ordinary circumstances, specific assets are assigned to segments, and the investment income generated by these assets is allocated to the segment. However, upon insolvency, all assets are available to the liquidator to meet *(Footnote continued)*

Because the insurance industry has steadfastly refused to accept the language of §401(b)(2), however, the availability of segmentation and similar devices to bring the industry into conformance with ERISA has gone largely unexplored. *Cf. Jacobson v. Hancock*, 655 F. Supp. at 1299 ("An insurer may not use a general account to harbor a plan's assets, create a potential conflict and thus claim relief from a fiduciary's obligations").

Moreover, Hancock and the insurance industry have also failed to explore specific mechanisms within ERISA which would have permitted Hancock to seek variances in order to minimize any disruptions to its business "consistent with adequate safeguards to protect employee benefit plans." ERISA Conf. Rep., *reprinted in* 1974 U.S.C.C.A.N. at 5090. Section 408 sets forth procedures under which exemptions from §406's Prohibited Transaction provision can be obtained from the Secretary of Labor. 29 U.S.C. §1108(a).[44] It would be administratively simple to convert IB 75-2 into a class exemption from §406 for the insurance industry. *Id.*; 29 C.F.R. §2570.30-.52 (1990).[45] Thus, it is meritless for Hancock to argue, without mentioning §408, that Congress could not have intended the disruption to insurance companies engendered by a proper interpretation of the "guaranteed benefit policy" exemption.

the liabilities of the company. It is difficult to believe that the DOL, the Pension Benefit Guarantee Corporation and the National Association of Insurance Commissioners could not develop a procedure to accommodate insolvencies. Moreover, "guaranteed benefits" would be subject to these same vagaries upon insolvency, a fact of which Congress was presumably aware in 1974.

[44] Under the applicable standards an exemption must be: (1) administratively feasible; (2) in the interests of the plan and of its participants and beneficiaries; and (3) protective of the rights of participants and beneficiaries of such plan. 29 U.S.C. §1108(a) (1992).

[45] Hancock, along with other insurers operating separate accounts, has complied since 1975 with dual regulation under ERISA and state insurance law with respect to group annuity contracts sold through separate accounts. The industry was required to meet ERISA's fiduciary responsibility requirements and to comply with extensive state regulations. *See, e.g.*, Separate Accounts and Separate Account Annuities, N.Y. Comp. Code R. & Regs., tit. 11A § 50.1-50.12. The industry has sought and obtained certain class exemptions for ERISA under section 1108(a). *See, e.g.*, PTE 81-82, 46 Fed. Reg. 46443 (1981). Individual insurance companies sought and obtained prohibited transaction exemptions with respect to specific transactions. *See, e.g.*, PTE 88-92, 53 Fed. Reg. 38, 798 (1988).

Indeed, it is pursuant to such administrative mechanisms that Hancock and other insurance companies have operated ERISA-covered pooled separate accounts. It should be noted that in the context of these pooled accounts, insurance companies have balanced the interests of many plans in the assets of these accounts. Apparently, no "irreconcilable conflicts" have arisen in the management of these accounts.

Finally, a simple expedient has always existed by which Hancock could have eliminated, or at least substantially reduced, any exposure it might have to the burdens of dual regulation. In 1988, Hancock finally agreed to an amendment to GAC 50 permitting the plan to withdraw the bulk of GAC 50's free funds from the general account. Although this withdrawal was subject to a market value adjustment, Hancock agreed to eliminate the other penalties previously attached to any transfer of funds, such as termination of the PA Fund, reversion of GAC 50 to a deferred annuity contract and the repurchase of the antiquated deferred annuities which were cancelled in 1968 (S.C.A. 519, ¶ 10; S.C.A. 559, ¶ 10). After Hancock agreed to this amendment, the plan transferred nearly $53 million to other funding vehicles (S.C.A. 561), thereby eliminating any potential conflict between state and federal law at least as to these funds. An expedient such as transfer of the "free funds," of course, could have been offered by Hancock long before 1988.

B. *Federal Protection For Non-Guaranteed Portions of General Account Contracts Advances ERISA's Goals*

The need for ERISA protection for funds not associated with guaranteed benefits is apparent in light of the treatment of insurance customers such as the Trustee under state insurance laws. The DOL recognizes this need: "[W]e recognize that a holding that assets held by insurance companies pursuant to contracts like GAC 50 are 'plan assets' would provide significant added legal protection against losses by pension plans, because ERISA imposes restrictions not currently provided by contract and insurance law." U.S. at 25-26.

The recent collapse of Executive Life Insurance Company and Mutual Benefit Life Insurance Company highlights the need for federal regulation of group annuity investment contracts like GAC 50. The history of these failures illustrates that state insurance

regulators have been unable to cope with the proliferation of investment vehicles sold by insurance companies under the rubric of "insurance." But for ERISA, additional insurance company failures could undermine pension plans upon which retirees and beneficiaries rely.

The risk of such failures is compounded by the limited scope of state guaranty laws. The Life Insurance Guaranty Corporation of New York Act is inapplicable to "[t]hat portion or part of any policy, contract or agreement under which the risk is borne by the holder thereof." N.Y. Ins. Law §7703(b)(2) (Consol. 1993). Massachusetts includes a similar provision in its Life and Health Insurance Guaranty Association Law. The protection of that guaranty association is not extended to

> (a) any portion of a policy or contract not guaranteed by the insurer, or under which the risk is borne by the policy or contract holder;
>
> • • •
>
> (c) any annuity contract or group annuity certificate that is not issued to and owned by an individual, except to the extent of any annuity benefits guaranteed to an individual by the insurer under any such contract or certificate.

Mass. Ann. Laws ch. 175, §146(B)(4)(B)(2) (Law Co-op. 1993).

Thus, in the event of Hancock's insolvency, both New York and Massachusetts will provide the protection of their guaranty funds *only* to the recipients of "guaranteed benefits" under GAC 50. In contrast, to the extent that the Plan's assets consist of "free funds," the Plan would be denied any recovery from the guaranty funds, reflecting the determination of the *amici* states that contracts like GAC 50 are indeed divisible, and that the contract in its "accumulation" phase is not entitled to relief.

The need for ERISA's protection is also illustrated by the district court's treatment of the Trustee's claims in this action. The Trustee has alleged far more than the mere technical violations of ERISA that Hancock mentions in its brief. The Trustee claims that Hancock engaged in a variety of improper practices, including:

a. the use of investment income properly attributable to GAC 50 and other older contracts to attract new business by inflating the investment return on new contracts during their first two years;

b. the allocation to GAC 50 of inflated expenses, in the form of investments in "Home Office" properties, in order to subsidize labor-intensive lines of business;

c. the use of GAC 50's pension funds to subsidize new business ventures, some speculative, designed to bolster other lines of business;

d. the over-compensation of Hancock through excessive charges and over-priced annuities; and

e. the refusal to permit the Trustee to use "free funds" for pension purposes or to withdraw such funds.

After the district court dismissed the Trustee's ERISA claims, Hancock moved for summary judgment as to the Trustee's claims that state law forbids these practices. The district court concluded that state law permitted such practices, which inarguably are prohibited under ERISA, and summarily dismissed all of the Trustee's state law claims. *Harris II*, P.A. 63-87. In light of the lack of state control of such practices, the need for ERISA fiduciary duty protection is clear.

V.

STATE LAW CANNOT AND DOES NOT PRE-EMPT ERISA; NEITHER THE McCARRAN-FERGUSON ACT NOR THE SAVINGS CLAUSE IS TO THE CONTRARY

Hancock and *amici* other than the United States contend that state insurance laws pre-empt ERISA. Hancock at 30-31; NYMA at 10-11. Their arguments are without merit. Neither the McCarran-Ferguson Act, 15 U.S.C. §1012(b), nor ERISA's Savings Clause, 29 U.S.C. §1144(b), mandates or permits such pre-emption.

Hancock's argument on this aspect of the case is rejected by the United States. Its brief states:

> We do not think, however, that the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, precludes the application of ERISA to an insurer's actions under a general account contract, and leaves regulation exclusively to the States. That argument was correctly rejected by the district court. Pet. App. A27-35. . . . ERISA, both in general and in the guaranteed benefit policy provision in particular, ***obviously and specifically relates to the business of insurance.*** . . . Moreover, dual regulation under ERISA and state law is not an impossibility. Many requirements are complementary, and in the case of a direct conflict, ***federal supremacy principles require that state law yield.*** Pet. App. A29-31.

U.S. at 23, n.13. Hancock's argument was also rejected by the district court and it was not raised by Hancock before the Second Circuit. *Harris I*, P.A. 26-35.

A. *To the Extent that State Insurance Laws Conflict with ERISA, They Are Preempted*

1. *The Statutory Scheme*

ERISA contains a broad pre-emption provision:

> Except as provided in subsection (b) of this section, the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

29 U.S.C. §1144(a). The "savings" clause of ERISA provides:

> Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

29 U.S.C. §1144(b)(2)(A).[46]

Section 1144 requires a three-part analysis of each state law that might be affected by ERISA in order to determine whether the *state law* survives. The analysis never bears on the question of whether ERISA survives, as argued by Hancock. *See Pilot Life Ins. Co. v.*

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[46] Hancock and *amici* argue that the "savings" clause indicates Congress's intent to exempt general accounts from ERISA. ERISA §1144(b)(2)(A). *See, e.g.*, U.S. at 23; ACLI at 24-25; LICONY at 13-14, 18. However, the "savings" clause indicates only the intention of Congress not to allow insurance companies to escape state regulation as a result of the statute's broad pre-emption provision.

Dedeaux, 481 U.S. 41, 44 (1987) ("*Pilot Life*").[47] Its only function is to determine whether a *state* law or regulation of the insurance industry stands or falls, and is irrelevant in this case because the only issue here is whether ERISA applies, which it clearly does.[48]

2. *The Pilot Life Analysis*

Hancock and *amici* fail to heed this Court's *Pilot Life* decision holding that where a state law might arguably "regulate[] insurance" and would be "saved" from preemption under ERISA's savings clause but would also undermine a clearly expressed intention of Congress in enacting ERISA, the state law is preempted. 481 U.S. 41, 52-56 (1987). Congress clearly expressed its intention to regulate contracts other than "guaranteed benefit policies," and to impose ERISA's fiduciary responsibility provisions upon the insurance industry; therefore, any contrary state laws must yield. 29 U.S.C. §1101(b)(2)(B).

[47] *See also Gelzinis v. John Hancock Mut. Life Ins. Co.*, No. 93-0569, 1993 U.S. Dist. LEXIS 5483 (E.D. Pa. Apr. 26, 1993) (where Hancock successfully argued that Pennsylvania's insurance bad faith statute was pre-empted by ERISA); *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564, 572 (E.D. Cal. 1988) (where Hancock successfully argued that plaintiff's claims for punitive damages under California Insurance Code §790.03(h) were preempted by ERISA). Interestingly, in both *Gelzinis* and *Dodd*, Hancock prevailed by taking the very opposite of the position it has taken here.

[48] The analysis of whether a state law will be preempted by ERISA can be summarized as follows:

i) Pre-emption: Does the state law "relate to any employee benefit plan"? If not, the state law remains and no further analysis is necessary. If it does "relate," then the state law is preempted unless "saved" under the second and third steps. 29 U.S.C. §1144(a).

ii) Savings: Does the state law "regulate[] insurance, banking, or securities"? If it does not, the state law remains preempted and no further analysis is necessary. If it does, then no person is "exempt[ed] or relieve[d]" from compliance with the state law (*i.e.*, the state law is "saved"), unless there is a conflict under the third step. 29 U.S.C. §1144(b)(2)(A); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982).

iii) Conflict: If the state law both relates to any employee benefit plan and regulates insurance, banking or securities, does it conflict with any provisions of ERISA? If not, then both ERISA and state law will be enforced. If the state law conflicts, then ERISA preempts the state law. *Pilot Life*, 481 U.S. at 51-57.

In *Pilot Life*, this Court was asked to determine whether Mississippi's common law of bad faith could be invoked by a plan participant in an action against the provider of an insured group health policy sold to an ERISA-covered employee benefit plan. The Court held that the common law claim could not be enforced because it afforded remedies, such as punitive damages, intentionally excluded by Congress from ERISA. *Pilot Life*, 481 U.S. at 54.

The Ninth Circuit, interpreting *Pilot Life*, held that a California Insurance Code provision (§790.03) which permitted private rights of action for "unfair insurance practices," including claims for compensatory and punitive damages, was preempted by ERISA. *Kanne v. Connecticut General Life Insurance Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) ("*Kanne*"). The court assumed without deciding that the law in issue "regulate[d] insurance" within the meaning of the savings clause. *Id.*

> Nevertheless, under *Pilot Life* we find the conclusion inescapable that §790.03(h) is preempted by ERISA.
>
> * * *
>
> We do not find it possible to read this language [from *Pilot Life*] in a way that permits a state statute like §790.03(h) to supplement the ERISA civil enforcement provisions available to remedy improper claims processing.

Kanne, 867 F.2d at 494. *See also Donatelli v. Home Ins. Co.*, 992 F.2d 763 (8th Cir. 1993).

Thus, a valid state regulation of insurance will be preempted by ERISA, despite the savings clause, if the regulation conflicts with the clearly expressed intention of Congress in enacting ERISA.

3. *McCarran-Ferguson Act*

Hancock and *amici* argue that McCarran-Ferguson applies independently of the Savings Clause through ERISA §514(d), which

provides that ERISA's Title I should not be construed to supersede any federal statutes. 29 U.S.C. §1144(d); Hancock at 31. However, McCarran-Ferguson's preservation of state insurance law does not apply where a federal statute "specifically relates to insurance," as ERISA clearly does. U.S. at 23, n. 13; 15 U.S.C. §1012(b); *U.S. Dep't of Treasury v. Fabe*, 113 S. Ct. 2202 (1993); *Pilot Life*, 481 U.S. at 51-57.

Congress' declaration of policy in the McCarran-Ferguson Act explicitly stated that the purpose of the Act was to prevent application of federal regulation to the business of insurance and preemption of state law in that field by the courts *except* where Congress has explicitly stated its intention to regulate in the area. The declaration of policy provides that "*silence* on the part of Congress shall not be construed to impose any barrier" to state regulation of the business of insurance. 15 U.S.C. §1011 (1988) (emphasis added). As set forth above, Congress clearly and explicitly has regulated the insurance industry by including its contracts and policies and the assets that support them among plan assets subject to ERISA's stringent fiduciary duty requirements. See 29 U.S.C. §401(b)(2)(B). Moreover, the McCarran-Ferguson Act "is to be narrowly construed in the face of valid federal regulatory interests: accommodation of federal and state regulatory interests is to be sought." *SEC v. Republic Nat'l Life Ins. Co.*, 378 F. Supp. 430, 436 (S.D.N.Y. 1974).

In sum, to the extent ERISA specifically conflicts with state insurance law, such state law is preempted under the analysis mandated by *Pilot Life*, the Supremacy Clause and the McCarran-Ferguson Act. *Pilot Life*, 481 U.S. at 51-57; 15 U.S.C. §1012(b); 29 U.S.C. §1144(a), (b), (d).

B. *Where ERISA and State Insurance Law Are Consistent, Hancock Is Subject to Dual Regulation*

Hancock's argument that state insurance law preempts ERISA is not new; it was rejected over ten years ago by the Court of Appeals for the Seventh Circuit in *Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Co.*, a case

directly on point which Hancock does not cite. 713 F.2d 254 (7th Cir. 1983) ("*Chicago Board*"). In *Chicago Board*, Connecticut General's argument, identical to Hancock's here, was dismissed as baseless. The court reasoned:

> That ERISA does not relieve insurance companies of the onus of state regulation does not mean that Congress intended ERISA not to apply to insurance companies. Had that been Congress' intent we are sure that ERISA would have directly stated that it was preempted by state insurance laws. *Congress clearly intended that insurance companies be subject to dual regulation, at least as long as federal and state regulations do not conflict.*

Id. at 260 (emphasis added); *see also N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295 (7th Cir. 1992).

The only relevant case upon which Hancock relies in fact supports the Trustee. In *Metropolitan Life Insurance Co. v. Massachusetts*, petitioner Metropolitan Life was seeking to escape a Massachusetts insurance law provision which required minimum mental health benefits in all group health insurance policies for Massachusetts residents. 471 U.S. 724 (1985). This state law did not conflict with any ERISA requirements; thus the Court never faced that issue in *Metropolitan Life*. *Id.* at 732 ("ERISA . . . contains almost no federal regulation of the terms of benefit plans").

Metropolitan Life merely holds that ERISA-covered plans which purchase group health policies from insurance companies are governed by both ERISA and state insurance mandated minimum benefit laws. *Metropolitan Life*, 471 U.S. at 747. Thus, while self-insured plans are subject only to ERISA, plans which purchase benefits from insurance companies are subject to both ERISA and state insurance law. *See* 29 U.S.C. §1144(b)(2).[49]

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[49] The balance of the cases cited by Hancock and *amici* are inapposite. All conclude that the state law at issue was not preempted; however, none hold that ERISA therefore does not apply.

It is clear that state insurance laws and ERISA can and do co-exist. Since 1975, the states and the federal government have regulated insurance company separate accounts without apparent difficulty. *See e.g.*, N.Y. Ins. Law §4240 (Consol. 1993); N.J. Admin. Code tit. 17B §28-1 to 28-15 (1992); "Separate Accounts and Separate Account Annuities," N.Y. Comp. Codes R. & Regs. tit. 11A §50 (1971); "Market Value Separate Accounts Funding Guaranteed Benefits; Separate Accounts Operations and Reserve Requirements," N.Y. Comp. Codes R. & Regs. tit. 11B §97 (1990). In the context of separate accounts, the insurance industry has made ample use of the administrative procedures that ERISA provides. *See, e.g.*, PTE 81-82 and 88-92, *supra* at n. 46.

CONCLUSION

For all of the foregoing reasons, Respondent Harris Trust and Savings Bank, as Trustee of the Sperry Master Retirement Trust, No. 2, respectfully requests that the decision of the Court of Appeals be affirmed.

Dated: July 9, 1993

Respectfully submitted,

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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner John Hancock Mutual Life Insurance Company ("Hancock")[1] submits this Reply Brief in response to the Brief for Respondent Harris Trust and Savings Bank ("Harris Trust") and to the briefs *amicus curiae* filed in support of Respondent.[2]

[1] The list of Parties provided in the Brief for Petitioner pursuant to Rule 29.1 continues to be correct as of the date hereof.

[2] References to the Brief for Petitioner and to the Brief for Respondent are cited as "Pet. Br." and "Resp. Br.", respectively, followed by the page number.

(*Footnote continued*)

Argument

GAC 50 IS IN ITS ENTIRETY A "GUARANTEED BENEFIT POLICY" WITHIN THE MEANING OF ERISA § 401(b)(2)

The core function of insurance is the spreading of risk among many policyholders through the pooling of insurance premiums. To that end, an insurance company commingles and invests premiums in its General Account and uses the resulting principal and income to satisfy its obligations to its policyholders. Payment of those obligations is secured by all the assets of the General Account. Policyholders, including pension plans, do not have an interest in any specific assets held by the insurer, but receive a guarantee that the company will pay the contractually agreed benefits. Every State has adopted a comprehensive regulatory scheme to ensure the solvency of insurers and the equitable, non-discriminatory treatment of all policyholders.

The fundamental question in this case is whether ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2) (1988), should be construed to supersede these long-standing arrangements. Harris Trust's brief asserts that an unspecified portion of Hancock's General Account assets, though supporting obligations to a broad range of policyholders, should be considered assets belonging exclusively to the Sperry Plan and that ERISA requires Hancock to manage these unidentified assets "solely in the interest of" that plan. Harris Trust's argument has no basis in the language or purpose of section 401(b)(2).

Relying inappropriately on decisions of this Court under the federal securities laws, Harris Trust argues that GAC 50 should

References to the briefs *amicus curiae* filed in support of Petitioner by the United States, the State of New York and the Commonwealth of Massachusetts (the "State Insurance Commissioners"), the American Council of Life Insurance and the Life Insurance Council of New York are cited as "US Br.", "NYMA Br.", "ACLI Br." and "LICONY Br.", respectively, followed by the page number. References to pages of the Appendix included in the Petition for a Writ of Certiorari, the Joint Appendix, and the Appendix to the Brief for Petitioner are cited as "PA-", "JA-", and "A-", respectively, followed by the page number.

be considered an investment vehicle, not an insurance policy. But GAC 50 is a traditional General Account insurance product. In exchange for the premiums paid by Harris Trust, Hancock assumes substantial risks, including the unconditional guarantee of payment of pension benefits and a guaranteed rate structure under which additional annuities can be purchased by the Sperry Plan.

Harris Trust's construction of section 401(b)(2) incorrectly assumes that an insurer is able to manage separately a portion of its General Account assets. GAC 50 does not have any specific assets or funds associated with it to which ERISA's fiduciary rules could be applied. Although the contract provides for an accounting of the premiums received, benefits paid and other transactions affecting the contract, the only "funds" associated with GAC 50 are the entirety of the assets in Hancock's undivided General Account. The so-called "free funds" under the contract are not funds at all, but merely a colloquial expression of the amount by which the book value of the contract at any time exceeds the computed value of existing guaranteed benefits. Because the "free funds" under GAC 50 are not assets, Harris Trust's argument that the "free funds" can and, under ERISA's fiduciary rules, must be managed for the benefit of the Sperry Plan is insupportable.

The Department of Labor ("DOL") rejects Harris Trust's position. It has consistently construed section 401(b)(2) to exclude from ERISA's fiduciary provisions General Account contracts like GAC 50 that provide solely for fixed guaranteed benefits. That construction, with which Hancock concurs, recognizes that General Account assets cannot be managed solely in the interest of any one policyholder. The DOL's interpretation is both correct and entitled to deference.

A. *Harris Trust's Construction of Section 401(b)(2) Is Inconsistent with the Statutory Language.*

Harris Trust, like the court below, incorrectly assumes that there are discrete assets assigned to GAC 50 and that the contract can be bifurcated into "guaranteed" and "non-guaranteed"

portions. Harris Trust contends that a group annuity contract does not "provide for" guaranteed benefits within the meaning of section 401(b)(2) unless all "funds" held under the contract have been used to purchase fixed guaranteed benefits. Resp. Br. at 18. In addition, Harris Trust argues that GAC 50 is not a guaranteed benefit policy to the extent of its "non-guaranteed portion," because the "free funds" do not bear a fixed rate of investment return to the plan. *Id.* at 20-25.[3] Harris Trust's construction of section 401(b)(2), however, finds no support in the statute's text.[4]

1. *GAC 50 "Provides for" Guaranteed Benefits in Its Entirety.*

It is undisputed that all of the funds credited to GAC 50 may be used, at the contractholder's election, to provide guaranteed benefits. Resp. Br. at 4. According to Harris Trust, however, the "guaranteed benefit policy" provision applies only to the extent of the fixed guaranteed benefits that the contractholder has already purchased. This construction ignores the common, ordinary meaning of the phrase "provides for." The principal definitions of "provide" are "[t]o furnish; supply; to make

[3] It is not clear whether Harris Trust takes the position that, if there were a guaranteed rate of investment return with respect to the so-called "free funds," GAC 50 would be a "guaranteed benefit policy" in its entirety. It is also not clear, therefore, whether Harris Trust is abandoning the Second Circuit's reasoning, under which assets held under a contract providing either guaranteed benefits or a fixed rate of return are not subject to ERISA's fiduciary requirements (*see* PA-10). Earlier, Harris Trust took the position that a guaranteed investment contract (or "GIC"), which typically has a guaranteed rate of return, is a "guaranteed benefit policy" (JA-86, JA-102).

[4] Harris Trust devotes substantial attention in its Brief to the "to the extent that" phrase in section 401(b)(2)(B). *See, e.g.*, Resp. Br. at 11-14. There is no dispute, however, that a contract is a "guaranteed benefit policy" only "to the extent that" it "provides for benefits the amount of which is guaranteed by the insurer." ERISA § 401(b)(2)(B), 29 U.S.C. § 1101(b)(2)(B) (1988). Contrary to Harris Trust's assertions, Resp. Br. at 12-14, neither Hancock nor the DOL contends that section 401(b)(2) insulates all General Account assets from "plan assets" treatment. *See* Pet. Br. at 26-29; US Br. at 16-19. The question here is whether GAC 50 in its entirety satisfies the "provides for" test.

available." *The American Heritage Dictionary* 1458 (3d ed. 1992). *See* US Br. at 16. When "provide" is used in conjunction with "for," the principal meaning of that phrase is "to take measures in preparation." *The American Heritage Dictionary*, *supra*, at 1458.[5] The natural construction of section 401(b)(2)(B), therefore, is that a General Account contract is a "guaranteed benefit policy" to the extent that the amounts credited to the contract can be used, immediately or in the future, to provide fixed guaranteed benefits. US Br. at 16. Harris Trust's misreading of the "provides for" language inappropriately narrows the scope of that section.

Harris Trust's further contention that to satisfy section 401(b)(2) there must be a guaranteed investment return with regard to the "free funds" is created out of whole cloth. It finds no support whatever in the text of ERISA, nor is such a requirement mentioned or even alluded to in the statute's legislative history. Section 401(b)(2) defines a "guaranteed benefit policy" with reference to "benefits"— used everywhere in ERISA to mean benefit payments to plan participants and beneficiaries — not with reference to an investment return (or any other form of payment) to the plan. Pet. Br. at 23-25; US Br. at 16.

2. ***The Federal Securities Laws Decisions Cited by Harris Trust Are Inapposite.***

Harris Trust predicates its investment return requirement on its reading of *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967), *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959) ("*VALIC*"), and other cases that construe the exemption

[5] In its construction of section 401(b)(2), Harris Trust distorts the meaning of the "provides for" language by reading the section as if it requires that "benefits have been guaranteed." Resp. Br. at 19 (the first sentence of § 401(b)(2)(B) is "designed to limit the exemption to that portion of a contract under which benefit payments were guaranteed") (emphases omitted). By its steadfast misreading of the "provides for" phrase, it evades the phrase's most common usage, *viz.*, to "make provision." *See Webster's Third New International Dictionary* 1827 (1986); *Webster's New International Dictionary* 1994 (2d ed. 1959). GAC 50 indisputably "makes provision" for guaranteed benefits to the full extent of the contract's book value.

of "insurance" from the registration requirements of the federal securities laws.[6] Resp. Br. at 17, 20-25. Those laws contain a specific treatment of insurance crafted by Congress to address the purposes and policies inherent in the federal scheme of securities regulation. ERISA serves very different purposes.[7]

In the federal securities laws, Congress focused on the nature of the relationship between the issuer and the contractholder to determine whether a variety of products constituted "insurance" for purposes of federal securities regulation. *United Benefit* and *VALIC* considered whether variable annuities were "insurance" by analyzing the transfer of investment risk from the insured to the insurance company, *i.e.*, whether investment return to the contractholder was guaranteed by the insurer or variable based upon the contract's participation in the insurer's investment experience. *United Benefit*, 387 U.S. at 208; *VALIC*, 359 U.S. at 71-72. That analysis has no relevance, however, to ERISA's section 401(b)(2), because Congress defined a "guaranteed benefit policy" by reference to whether the benefits paid to plan participants were guaranteed, not whether the contractholder bears investment risks. *See Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt*, 930 F.2d 267, 272-73 (3d Cir. 1991).[8]

[6] In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), the Seventh Circuit, relying upon *United Benefit* and *VALIC*, held that the insurance contract in issue was not a "guaranteed benefit policy" under section 401(b)(2), because, except for a modest interest guarantee, it was credited with a variable investment return on the funds not yet used to purchase annuities. *Id.* at 324-27. *Peoria Union* is neither sound authority nor substantively correct. Pet. Br. at 25 n.42.

[7] In *United Benefit*, the Court stated that it was a "difficult" question whether the Investment Company Act regulations, which "are substantive and go well beyond the disclosure requirements of the Securities Act" would also apply to the product in question. *United Benefit*, 387 U.S. at 208. ERISA's fiduciary provisions similarly impose "substantive" regulations. The Court expressly held in *United Benefit* that its decision could not be extended to other contexts, particularly with respect to a contract issued by a company that "in the main is an insurance company." *Id.* at 212.

[8] In addition, unlike GAC 50, the contracts at issue in those cases involved "variable" annuities and the assets underlying the contracts were invested in

(Footnote continued)

3. *GAC 50 Is Not an Investment Vehicle.*

As a predicate to its misplaced *United Benefit* analysis, Harris Trust mischaracterizes GAC 50, asserting that the contract is an "investment vehicle" under which there are no risks transferred from the insured to the insurer. Resp. Br. at 24. That issue is irrelevant, however, to the proper construction of the "guaranteed benefit policy" provision, and, in any event, Harris Trust's characterization is not correct.

As the district court found in *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 722 F. Supp. 998 (S.D.N.Y. 1989) (*"Harris I"*), substantial insurance risks are assumed by Hancock under GAC 50 (PA-53 to PA-56). Most importantly, Hancock has guaranteed benefits to participants and beneficiaries who have been designated by the Plan to receive such benefits and is obligated to pay those benefits unconditionally, irrespective of actual investment and mortality experience and the book value of the contract (PA-54; JA-85, JA-89, JA-91, JA-122, JA-172). Moreover, Hancock provides a guarantee of principal and of the risk charges applicable to investment income apportioned to GAC 50 (PA-55; JA-88, JA-91, JA-102, JA-132 to JA-133).

In addition, Hancock is obligated under GAC 50 to the full extent of the "free funds" to provide additional guaranteed benefits, at Harris Trust's option, at annuity purchase rates contained in the contract.[9] As the district court held in *Harris I*, Hancock assumed substantial risks under the contract with

Separate Accounts. *United Benefit*, 387 U.S. at 208; *VALIC*, 359 U.S. at 69-70. Moreover, the contract in *United Benefit* clearly had separate phases over time, *United Benefit*, 387 U.S. at 205-06, and there was an identifiable period during which, the Court found, there was little transfer of risk. *Id.* at 208-09.

[9] Upon the purchase of additional guaranteed benefits under the contract (i) the computed value of existing guaranteed benefits (*i.e.*, the Liabilities of the Fund) is increased by an amount equal to the computed value (*i.e.*, the purchase price) of the newly purchased benefits and (ii) the amount of the contract's "free funds" is decreased by a corresponding amount. Neither the book value of the contract (*i.e.*, the Pension Administration Fund) nor any General Account assets are affected in any way by such a transaction.

regard to the "free funds" by granting Harris Trust the right to provide annuities to newly eligible employees or additional groups of employees at guaranteed rates. *Harris I* (PA-56).[10] The existence of so-called "free funds" under the contract, therefore, does not eliminate Hancock's risk or transform GAC 50 from an insurance contract into an investment vehicle.[11]

Despite the district court's finding, Harris Trust argues in this case for the first time that, since Hancock could change the annuity purchase rates after December 31, 1972, it assumed no risk with respect to the "free funds." Harris Trust misrepresents the contract in claiming that the rates could be changed unilaterally by Hancock at any time that Harris Trust sought to purchase additional annuities. Resp. Br. at 4, 5, 15-16, 24. Under GAC 50, beginning with the year 1973, Hancock could modify the rates for future purchases by giving Harris Trust at least 90 days' advance written notice prior to January 1 of each year (JA-176). If the rates had been changed, Hancock would have been obligated to apply those rates whenever Harris

[10] The contractholder's right to purchase additional guaranteed benefits at rates fixed in the contract permits the contractholder to shift the risk of future interest, mortality and expense developments to the insurer. Kenneth Black, Jr., & Harold D. Skipper, Jr., *Life Insurance* 497 (11th ed. 1988). Harris Trust, citing Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 564 (6th ed. 1989), asserts that Professor McGill "acknowledges that optional purchase provisions in IPG contracts like GAC 50 are no more than a *pretense*." Resp. Br. at 16 (emphasis in original). The authors, however, "acknowledge" no such thing. In the passage cited by Harris Trust, the authors explicitly describe "investment only arrangements, such as the guaranteed income contract" and point out that, "while written in the form of an IPG contract," such contracts often "make no pretense of offering annuities and . . . contain[ ] no reference to annuity purchase rates." McGill & Grubbs, *supra*, at 564. It is clear from the text that the authors are not describing or referring to conventional IPG contracts like GAC 50.

[11] Harris Trust attempts to make much of the 1988 amendment to GAC 50 by which the sum of $53 million was transferred from GAC 50 by Harris Trust without termination of the contract's Pension Administration Fund ("PAF"). Resp. Br. at 6. Despite Harris Trust's obfuscation, it is clear that Harris Trust, as contractholder, always had the unilateral right to transfer the amount of the "free funds," or book value excess, subject to a market value adjustment

(Footnote continued)

Trust sought to purchase additional guaranteed benefits.[12] Contrary to Harris Trust's assertions, therefore, Hancock has always been at risk with respect to any such additional annuity purchases. *See Harris I* (PA-54 to PA-56).

B. *The DOL Has Correctly and Consistently Interpreted Section 401(b)(2).*

The DOL has advised the Court that it agrees with Hancock that a "guaranteed benefit policy" is a "contract pursuant to which an insurer holds assets in its general account to guarantee the payment of fixed annuities." US Br. at 9. Harris Trust urges, however, that the DOL's construction of section 401(b)(2) "cannot be squared with the statutory language," rests upon a speculative reading of the legislative history and is inconsistent with its previous pronouncements. Resp. Br. at 30-33. The DOL's interpretation, however, is the only construction of section 401(b)(2) that is fully in accord with the text of the statute and its legislative history. It is entitled, therefore, to deference by this Court.

1. *ERISA's Legislative History, Though Sparse, Supports the DOL's Construction.*

The DOL correctly points out that the term "guaranteed benefit policy" was coined by the ERISA Conference Committee. US Br. at 11-12. It had no antecedents in the House or Senate bills, and the only reference to that provision in the Conference

(JA-101). Pet. Br. at 9 n.18. Harris Trust now claims that, absent the amendment, termination of the PAF would have been the necessary consequence of such a transfer. Hancock disagrees with that conclusion, but whether or not Harris Trust is correct, a contract provision relating to the transfer of the market value equivalent of the "free funds" is not in any way relevant to the issue of whether GAC 50 "provides for" guaranteed benefits.

[12] In fact, Hancock has never changed the annuity purchase rates (JA-101). Even if Hancock had annually changed the rates, however, it would continue to bear sufficient risk to satisfy the *United Benefit* and *VALIC* holdings, assuming that the analysis in those cases were relevant. *Cf. Associates in Adolescent Psychiatry S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 567-68 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1182 (1992) (insurance policy was exempt from the securities laws and was a "guaranteed benefit policy" when insurance company guaranteed annual rate of interest at beginning of each year).

Report is at best ambiguous. US Br. at 20-21. The DOL explains that the "guaranteed benefit policy" provision was inserted in place of a provision in the final Senate bill that explicitly exempted all General Account assets from the fiduciary provisions.[13] The DOL has offered the only plausible explanation of this development in the Conference Committee — that Congress intended a tightening of the explicit exemption contained in the Senate bill by excluding the possibility that variable annuities could be immunized from the fiduciary rules by being written on an insurer's General Account. *See* US Br. at 20. The DOL points out in its Brief that, under the Senate bill, it was theoretically possible for a General Account contract that provided variable benefits to be removed from ERISA's fiduciary requirements. *Id.*

Harris Trust attacks the DOL's explanation of the change on the ground that it is premised on a "potential loophole" that could not have existed. Resp. Br. at 29. Citing Hancock's brief, Pet. Br. at 19, Harris Trust contends that, since the insurance laws of all 50 States require that variable annuities be issued from Separate Accounts, section 401(b)(2) could not have been meant to address the potential problem identified by the DOL. Resp. Br. at 29-30. In fact, Congress' concern was not at all misplaced. In 1952, long before ERISA's enactment, New York enacted special legislation enabling the College Retirement Equities Fund ("CREF"), a companion organization of Teachers' Insurance and Annuity Association of America, to issue variable annuities out of what CREF characterized as its "General Account." 1952 N.Y. Laws 661.[14] In rewriting section 401(b)(2),

[13] The Senate bill provided:

> (*l*) This section shall not apply to -
>
> (1) funds held by an insurance carrier unless that carrier holds funds in a separate account . . . .

H.R. 2, 93d Cong., 2d Sess. § 15 (1974), *reprinted in* 3 Senate Subcomm. on Labor & Pub. Welfare, 94th Cong., 2d Sess., Legislative History of ERISA, 3599, 3781 (Comm. Print 1976) ("Legislative History of ERISA").

[14] The variable annuity contract discussed by the DOL in its Advisory Opinion 78-8A, March 13, 1978 (A-104), was issued in accordance with that statute. *See infra* at 14.

Congress may well have had in mind the possibility that special arrangements relating to insurers' General Accounts might be permitted by state legislatures or state insurance regulators that would undermine the basic policy of the statute that assets supporting variable annuity benefits should be treated as "plan assets."

Harris Trust argues that the Conference Committee's replacement of the blanket exemption in the Senate bill with the "guaranteed benefit policy" provision signaled a dramatic change. Resp. Br. at 12. Harris Trust is correct only insofar as it points out that the Conference Committee changed the language of the Senate bill, but its inference that the change was intended to reject the provision in the Senate bill in favor of a completely different approach is not supported by the legislative history. Quite the contrary, the legislative history, to the extent that it sheds any light on the "guaranteed benefit policy" provision, shows that the final bill was meant to implement the common intent of the Senate and House bills that, to the extent that a group annuity contract provided for fixed benefits, assets in an insurer's General Account would not be subject to ERISA's fiduciary rules.

According to the Staff Summary of Differences between the Senate and House versions of the final bill, H.R. 2,[15] though the House bill did not contain the same or similar language, it embodied the same policy as the Senate bill that assets in the General Account be exempt.[16] The Joint Explanatory Statement

[15] *See* Summary of Differences between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform (the "Staff Summary"), pt. 3, 93d Cong., 2d Sess. 2 (1974), *reprinted in* 3 Legislative History of ERISA, *supra*, at 5252. The Staff Summary was cited by this Court as authority for construing ERISA in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 376 n.24 (1980).

[16] Discussing the Senate position, the Staff Summary stated:

> *Senate Amendment*. - [The fiduciary obligation provisions] do not apply to:
>
> . . .

(Footnote continued)

of the Committee of Conference, which "explains the principal differences between the substitute agreed to in the conference and the House and Senate bills," did not identify any such difference with regard to the "guaranteed benefit policy" provision. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 249, 295-97 ("Conference Report"), *reprinted in* 3 Legislative History of ERISA, *supra*, at 4518, 4562-64.[17]

Certainly, if the Conference Committee intended the dramatic change suggested by Harris Trust, the Conference Report would have addressed the change explicitly. Pet. Br. at 33-35. The only plausible interpretation of this sparse legislative history is the DOL's explanation that Congress intended to tighten the complete exemption for General Account assets contained in the Senate bill by excluding the possibility that variable annuities could be immunized from the fiduciary rules by being written on an insurer's General Account, not to reject the exemption in favor of a completely different approach. *See* US Br. at 20.

2. *The DOL Has Been Consistent in Its Construction.*

Harris Trust contends that the DOL's interpretation of section 401(b)(2) should not be accorded deference, because,

> (6) funds held by an insurance carrier unless they are held in a separate account . . . .

Staff Summary, *supra*, at 2. Discussing the House position, the Staff Summary stated:

> Although the House bill does not specifically exempt these funds from the fiduciary responsibility rules, *the policy of the House bill is the same*.

Id. at 2 n.3 (emphasis added).

[17] Under the Standing Rules of the Senate and the Rules of the House of Representatives, a joint Senate and House conference committee is prohibited from striking provisions that have been agreed upon by both chambers. For example, the Senate Rules state:

> Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.

(Footnote continued)

according to Harris Trust, it is a "recently adopted position first espoused in this Court, and unsupported by prior regulations, rulings, or administrative practices." Resp. Br. at 33. That is simply untrue.

As the DOL states in its Brief, its construction of section 401(b)(2) "was developed contemporaneously with ERISA's enactment and has been followed since that time." US Br. at 11. The DOL also points out that it has never brought any enforcement proceeding or otherwise sought to invoke ERISA's fiduciary provisions in connection with General Account contracts like GAC 50. US Br. at 13.

In its first authoritative pronouncement regarding ERISA in February 1975, Interpretive Bulletin 75-2 (February 6, 1975), 40 Fed. Reg. 31,598, *codified as revised*, 29 C.F.R. § 2509.75-2(b) (1991) ("IB 75-2"), the DOL declared that General Account assets are not to be considered "plan assets" (A-100). Harris Trust argues that IB 75-2 merely addressed application of ERISA's "prohibited transactions" rules; however, no such limitation is stated in IB 75-2. Moreover, the suggestion that such a limitation was intended is contradicted by the DOL's further statement the very next day, in its Advisory Opinion 75-79 (February 7, 1975), which was addressed to the fiduciary provisions generally (A-103). There the DOL reiterated that IB 75-2 "makes clear that when a plan purchases a policy or policies on an insurance company's general assets account, the plan assets consist of the policy, and not the underlying assets of the insurance company" (*id.*). Harris Trust does not mention Advisory Opinion 75-79 in its Brief.[18]

Standing Rules of the Senate, Rule XXVII ("Conference Reports"), § 2; *see also* Rules of the House of Representatives, Rule XXVII ("Conference Reports"), § 3. It would have been impermissible under those rules for the Conference Committee to reject the common intent and design of the bills adopted by the two Houses, and it is extremely unlikely that the Committee would have done so without comment or explanation in the Conference Report.

[18] Harris Trust's argument is essentially that the DOL, contrary to what the DOL now says, construed the phrase "plan assets" differently for application of the fiduciary provisions than for application of the prohibited transactions

(Footnote continued)

Harris Trust misreads various other DOL pronouncements from which it suggests that there has been inconsistency in the DOL's position over the years.[19] For example, Harris Trust contends that the DOL expressed the view in its Advisory Opinions 78-8A (March 13, 1978) (A-104) and 83-51A (September 21, 1983) (A-110) that fiduciary duties apply if a contract has a variable investment return component. But the outcome in Advisory Opinion 78-8A turned on the fact that the CREF "general account" contract provided for variable annuities, not variable investment return (A-106). *See also* US Br. at 27.[20] That conclusion is precisely the position taken by the DOL in its Brief here. The issue in Advisory Opinion 83-51A was whether assets in a contract denominated a "separate account" contract would be deemed "plan assets" if the contract provided for fixed obligations in all respects. The DOL concluded that the fiduciary

provisions. Harris Trust, quoting the court below (PA-13), attempts to support its argument by positing that " '[t]here is no inconsistency in considering certain assets to be plan assets for general fiduciary purposes but not for prohibited transactions purposes.' " Resp. Br. at 34-35. That distinction was rejected by the DOL 18 years ago in Advisory Opinion 75-79. US Br. at 27. As the DOL points out in its Brief, there is no basis in ERISA for defining "plan assets" differently for prohibited transactions than for ERISA's general fiduciary rules; in fact, the language of section 401(b)(2) "nowhere suggests that the [assets supporting a guaranteed benefit policy] may be plan assets for some purposes but not for others." US Br. at 26-27.

[19] Even if the DOL's statements regarding section 401(b)(2) had not always been consistent, inconsistency would provide no basis for not deferring to its position as stated in its Brief. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991).

[20] The DOL points out that IB 75-2 states that assets held in General Accounts are not "plan assets" subject to the fiduciary rules, without regard to whether variable or fixed annuities would be provided, because the DOL understood at the time IB 75-2 was issued that, under state law, variable annuities could not be written on a General Account. US Br. at 27. When, in Advisory Opinion 78-8A, the DOL was confronted with a contract that did provide for variable annuities written on what was denominated a "general account" (that of CREF), the DOL clarified its position, indicating that the assets underlying a contract will not be subject to "plan assets" treatment only to the extent that it provides for fixed, rather than variable, benefits. US Br. at 14, 27. That is consistent with the position urged by both the DOL and Hancock in this case. *See id.* at 14.

provisions would not apply (A-112). That opinion, despite the fact that it has no relevance to a General Account contract, is nonetheless in harmony with the DOL's interpretation of the statute. *See* US Br. at 27-28; Pet. Br. at 21 n.35.

Finally, Harris Trust argues that there is significance in the DOL's not having acted upon proposals made over the years by insurance company representatives for a complete exemption of all General Account assets from the definition of "plan assets." The DOL's position, however, has been and is today that assets in an insurer's General Account are excluded from "plan assets" treatment only if the contract in question provides for fixed, rather than variable, benefits. It is not inconsistent that the DOL declined to adopt a broader exemption.

When the DOL adopted its comprehensive "Plan Assets Regulation" in 1986, it expressly stated that the portion of IB 75-2 which dealt with assets placed in an insurance company's General Account was left unaffected. Preamble to Plan Assets Regulation, 51 Fed. Reg. 41,262, 41,278 (1986) (PA-111). In the words of the DOL, the basic principle in IB 75-2 was "reaffirmed," "repromulgated," "reconfirmed" and "reissued" in the Plan Assets Regulation, 29 C.F.R. § 2510.3-101 (1992) (PA-99). US Br. at 9, 11, 13, 14. Its consistent construction of section 401(b)(2) should be given deference by this Court as a thoroughly reasoned interpretation of the statute.

C. *Congress Did Not Intend, Nor Could the Insurance Industry Ameliorate, the Consequences of Section 401(b)(2) as Construed by Harris Trust.*

Harris Trust and its *amici* concede that their construction of section 401(b)(2) will disrupt long-standing General Account practices and create a conflict between federal and state law. *See, e.g.*, Resp. Br. at 38-42. They argue, however, that the legislative history shows that Congress anticipated those consequences and, to the extent that the industry might find it difficult to adjust to ERISA's requirements, empowered the DOL to mitigate the displacements through administrative mechanisms.

1. *There Is No Evidence in ERISA's Legislative History of an Intent to Disrupt Long-Standing Insurance Industry Practices.*

Harris Trust asserts that ERISA's Conference Report "makes clear" that Congress intended "the disruptions which were likely to follow from application of section 401(b)(2) to general accounts." Resp. Br. at 30. Although Harris Trust purports to rely upon the "Conference Report," Resp. Br. at 30, 31, 39, the Conference Report contains no evidence of any such intention. Harris Trust in fact quotes from and cites the Senate Report accompanying the Senate bill, S. Rep. No. 127, 93d Cong., 2d Sess. 32 (1973), *reprinted in* 1 Legislative History of ERISA, *supra*, at 618. Resp. Br. at 11-12, 28. Because the Senate bill explicitly excluded all General Account assets from ERISA's definition of "plan assets" (*see supra* at 9-12), the language quoted by Harris Trust from the Senate Report could only refer to Separate Account practices and could not possibly reflect a Congressional intent to subject General Account practices and regulation to ERISA's fiduciary requirements. The legislative history is devoid of any evidence that Congress contemplated, much less anticipated, any of the disruptions that Harris Trust's construction would produce.

Harris Trust next contends that the authority conferred on the DOL under section 408 to exempt fiduciaries and transactions from ERISA's prohibited transaction rules indicates that Congress understood the hardships that might be caused to insurance companies. Resp. Br. at 39-42. The mere existence of that mechanism, however, is no evidence that Congress had in mind any dislocations that ERISA's fiduciary duties might entail for insurance companies. Moreover, under section 408, the DOL lacks the authority to exempt insurance companies from the general fiduciary provisions of ERISA § 404, 29 U.S.C. § 1104 (1988 & Supp. 1991). Section 408 explicitly states that it applies only to "the restrictions imposed by sections 406 and 407(a)" and does not "relieve a fiduciary from any other applicable provision of this chapter." ERISA § 408, 29 U.S.C. § 1108 (1988).

2. *The Mechanisms Suggested by Harris Trust for Mitigating the Disruptions Would Not Succeed, Nor Would They Eliminate the Inherent Conflict Between Federal and State Law.*

Harris Trust and its *amici* argue that "segmentation" can be used by the industry to ameliorate the burdens of applying ERISA to General Account assets. *See, e.g.*, Resp. Br. at 40-41. Segmentation, however, is only a means of assigning General Account assets for income allocation purposes. *See* ACLI Br. at 23 n.26. Under state insurance law, all General Account assets support, on an unsegregated basis, all General Account liabilities, NYMA Br. at 22-23, and, irrespective of an insurer's income allocation methodology, General Account assets may not be managed under state law "solely in the interest of" any particular General Account policyholder. ACLI Br. 22-23; NYMA Br. at 18-19; LICONY Br. at 14-18. Furthermore, to the extent that ERISA's fiduciary provisions prohibit commingling "plan assets" with other funds, any General Account assets that are deemed to be "plan assets" could not be kept in the General Account, nor could they be used to support any obligation owed by the insurer to other contractholders. Harris Trust's view of ERISA's requirements, therefore, could not be satisfied by any action other than a segregation of assets into an account or accounts separately managed for pension plan contractholders.[21]

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[21] Actual segregation and removal of "ERISA-covered" assets from the General Account, of course, would be contrary to the very nature and purpose of insurance contracts that are backed by the full guarantee of the entire General Account. Such segregation would subject each plan to a greater risk of deviation from expected mortality experience and the higher costs associated with managing small asset pools rather than a single large one. Plans enter into insurance contracts precisely because they allow the transfer and sharing of mortality and investment risk. Although Harris Trust and its *amici* assert that applying ERISA's fiduciary provisions to an insurer's General Account would enhance participants' rights under ERISA, it may actually undermine benefit security. NYMA Br. at 6-7. Moreover, as the State Insurance Commissioners note in their Brief, implementing segregation would involve a cumbersome asset allocation process, provoke litigation and necessitate legislative intervention. NYMA Br. at 25-26.

Harris Trust tries to dispose of the inherent conflict between ERISA and state law by asserting that, to the extent that a conflict develops, state law will be preempted.[22] It provides not a single reference in the legislative history, however, that suggests that Congress anticipated or even considered that ERISA might supplant state regulation of insurance company General Accounts.[23]

As shown in its Brief, Hancock's construction of section 401(b)(2) avoids any conflict between federal law and state law. Pet. Br. at 29-35. Moreover, Hancock's interpretation gives effect to the long-standing federal policy, as expressed in ERISA's preemption saving clause, ERISA § 514(b), 29 U.S.C. § 1144(b) (1988 & Supp. 1991), and the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1988 & Supp. 1991), that the regulation

[22] Harris Trust argues that, as a consequence of ERISA's preemption clause, ERISA § 514, 29 U.S.C. § 1144 (1988 & Supp. 1991), and the Supremacy Clause, ERISA preempts state insurance laws. Resp. Br. at 44-50. Because the construction of section 401(b)(2) urged by Hancock avoids a conflict with state law, Hancock does not believe that the Court need reach the preemption issue discussed in Harris Trust's brief. In addition, Harris Trust misrepresents *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), as holding that ERISA preempts a state statute regulating the business of insurance when such a statute conflicts with ERISA. The state statute at issue in *Pilot Life* was explicitly found not to regulate the business of insurance and, for that reason, was not saved from preemption under ERISA. *Id.* at 50-52.

[23] Harris Trust asserts that ERISA should be held to apply to the "non-guaranteed" portion of a General Account contract, because state insurance guaranty laws do not apply. Resp. Br. at 14, 16 n.20. That assertion, however, is factually incorrect: Of the 39 jurisdictions (38 States plus the District of Columbia) that specifically address annuity contracts like GAC 50, 19 expressly include the unallocated, or "free funds," portion of the contract within the scope of the guaranty, *see, e.g.*, Ill. Ann. Stat. ch. 215, § 531.03 (Smith-Hurd 1993); Ohio Rev. Code Ann. § 3956.01 (Anderson Supp. 1991); Tex. Ins. Code Ann. § 21.28D (West 1981 & Supp. 1993), while 20 do not. Contrary to Harris Trust's assertions, Resp. Br. at 14 n.16, 16 n.20, 43, New York's statute, N.Y. Ins. Law § 7703 (Consol. 1993), appears to provide coverage for the unallocated portion of contracts like GAC 50. *See* Op. N.Y. Gen. Counsel No. 91-118 (Nov. 4, 1991). In the remaining 11 States, the application of the guaranty laws is unclear. In any event, Harris Trust fails to show that Congress was in any way influenced by the presence or absence of state guarantees in case of insurer insolvency or that the underlying policies of state guaranty laws and ERISA are at all related.

of the business of insurance should be left to the States.[24] *See* Pet. Br. at 30-31. As the State Insurance Commissioners note,

> the decision below would appear to mandate a thorough restructuring of the insurance industry under a federal law that was never intended to interfere with the States' traditional responsibility to regulate that industry.

NYMA Br. at 8.[25] In the absence of any indication in the statutory language or the legislative history that Congress intended to displace state regulation of General Account contracts and practices, section 401(b)(2) should be construed to avoid a conflict between federal and state law. *See Massachusetts v. Morash*, 490 U.S. 107, 119 (1989).

[24] Harris Trust argues that McCarran-Ferguson's reservation of the business of insurance to the States is overridden by section 401(b)(2), because that provision specifically relates to the business of insurance. Resp. Br. at 47-48; *accord*, US Br. at 23 n.13. That provision, however, implements the policy underlying McCarran-Ferguson by excluding the business of insurance from the applicability of ERISA's fiduciary rules. While ERISA does relate to insurance companies and to certain insurance products and practices (*e.g.*, variable annuity contracts and Separate Accounts), ERISA does not "specifically relate" to the "business of insurance," *i.e.*, General Account contracts and practices.

[25] Harris Trust attempts to show that federal and state regulation of General Account activities can co-exist, because insurance companies have been able to adjust to dual regulation with respect to their Separate Account activities. Resp. Br. at 41, 42, 50. That assertion ignores the fundamental differences between the purposes served by insurance company Separate Accounts and General Accounts. Separate Accounts frequently support variable annuities, which are not considered to be within the "business of insurance," and Separate Account investments are not subject to the same comprehensive state regulation applicable to General Account investments. *See* Pet. Br. at 19-21. Moreover, the "pooled" Separate Accounts referred to by Harris Trust (Resp. Br. at 42) are merely mechanisms for pooling the assets of contracts with common investment objectives. Such accounts are different from the General Account, which pools premiums from all lines of business and supports the insurance company's obligations to each of its contractholders to the full extent of the General Account's assets.

Conclusion

The judgment of the Court of Appeals, insofar as it reversed the judgment of the district court dismissing the action, should be reversed.

August 9, 1993

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No. 92-1074

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
PETITIONER

v.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE OF THE
SPERRY MASTER RETIREMENT TRUST NO. 2

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*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether petitioner, an insurance company, is a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, with respect to assets it holds in its general account under a contract that provides for the purchase of fully guaranteed fixed annuities for pension plan participants and beneficiaries.

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INTEREST OF THE UNITED STATES

This case raises an important issue concerning the scope of coverage of the fiduciary responsibility provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1168. The Secretary of Labor has general administrative responsibility for interpreting the definitional and coverage provisions of that Title, and for enforcing the fiduciary standards it imposes.

STATEMENT

1. In Section 3(21)(A) of ERISA, Congress provided that a person is a "fiduciary" with respect to a pension plan "to the extent * * * he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. 1002(21)(A). While Congress did not specify what constitute the "assets" of a pension plan, it provided in Section 401(b)(2) of ERISA, 29 U.S.C. 1101(b)(2), that:

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.

Congress further provided, in Section 401(b)(2)(B) of ERISA, 29 U.S.C. 1101(b)(2)(B), that:

> The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

2. The parties in this case dispute whether a contract known as Group Annuity Contract (GAC) 50 is a "guaranteed benefit policy" under Section 401(b)(2). GAC 50 originally was issued by petitioner John Hancock Mutual Life Insurance Company in 1941 to the Sperry Corporation (which is now Unisys). Respondent Harris Trust and Savings Bank is the trustee of Unisys's pension plan. Since 1968, GAC 50 has been an "immediate participation guarantee" (IPG) contract, which is a common method of funding pension benefits. See K. Black & H. Skipper, *Life Insurance* 496-497 (11th ed. 1987); D. McGill & D. Grubbs, *Fundamentals of Private Pensions*

562-564 (6th ed. 1989). Under an IPG contract, as long as the contract is in its "active phase," the pension plan participates in the investment experience of the insurer's "general account." A general account is available to satisfy the insurance company's obligations to all of its policyholders, and also serves as the insurance company's operating account, which it uses for its ordinary business expenses.[1]

In 1968, Hancock established an accounting fund called the "pension administration fund" under GAC 50. Hancock guaranteed the payment of all pension benefits earned under the Sperry pension plan up to 1968, and also promised to guarantee the payment of pension benefits to all of the plan's retirees in the future as long as the balance in the pension administration fund exceeds the "liabilities of the fund" by at least five percent. The liabilities of the fund represent the cost of the benefits guaranteed by Hancock. Pursuant to the contract, Hancock allocates a share of the investment income earned by its general account to the GAC 50 pension administration fund, and promises that the cumulative net share allocated to the pension administration fund will not be less than $0. Pet. App. A23-A25.

The "active phase" of an IPG contract terminates once the balance in the pension administration fund fails to exceed the liabilities of the fund by the amount specified in the contract—in this case, five percent. Upon termination, the insurance company uses the amount credited to the pension administration fund to purchase fully guaranteed annuities pursuant to terms fixed by the contract, and the fund ceases to exist. K. Black & H. Skipper, *Life Insurance*, *supra*, at 497. The active phase of GAC 50, the contract at issue in this case, has not yet

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[1] The insurance industry estimates that it holds more than $500 billion dollars in general accounts pursuant to contracts with pension plans. Amcius Br. of the American Council of Life Insurance in Support of the Petition for a Writ of Certiorari at 1.

terminated, because the amount Hancock credited to the pension administration fund has always exceeded the liabilities of the fund by at least five percent.

In 1977, the parties amended GAC 50 to provide that Hancock would no longer automatically guarantee the payment of benefits to employees retiring in the future. Although the plan retains the option to direct Hancock to guarantee benefits to retiring employees, the plan has not done so since 1977 because it considers the purchase of benefits under GAC 50 to be too costly.[2] The plan has instead turned to other sources to pay benefits as they become due. In fact, although Hancock has not guaranteed the payment of any benefits since 1977, from time to time the plan has requested Hancock to use the "free funds" in the pension administration fund—that is, the amounts credited to the pension administration fund in excess of 105 percent of the liabilities of the fund—to pay certain benefits to plan beneficiaries. The plan has done so pursuant to a provision in the 1977 amendment of GAC 50 that authorizes such payments, which are called "non-guaranteed benefits" because Hancock would simply make payments to a retiree at times specified by the plan without guaranteeing the payment of any future benefits. Hancock paid "non-guaranteed benefits" from the free funds on a number of occasions until 1982, when Hancock exercised its option to terminate the payment of such benefits. Pet. App. A6; J.A. 98.

The parties disagree about the amount of the free funds remaining in the pension administration fund, but by either party's measure the "free funds" have greatly increased since the early 1970s. That increase resulted

[2] The plan considers the annuities available under GAC 50 to be too costly because interest assumptions specified in 1968 are used to determine the present value of future benefits. The interest rates assumed in 1968 have been low compared to the relatively high market rates that have prevailed during much of the last 20 years, making the purchase price of annuities under GAC 50 relatively high.

from the pension administration fund's continued participation in Hancock's investment experience, combined with the plan's decision not to have Hancock guarantee the payment of any additional benefits. Thus, the pension administration fund has grown but the liabilities of the fund have not. Under GAC 50, the plan may transfer the free funds out of the pension administration fund. The plan has considered that option to be uneconomical, however, because a transfer would be subject to an asset liquidation adjustment under which the book value of certain assets would be converted to their market value, which would be substantially lower. See J.A. 96.[3]

3. In 1983, Harris Trust's predecessor as the plan's trustee filed suit against Hancock in the United States District Court for the Southern District of New York. The amended complaint alleged numerous violations of ERISA's fiduciary provisions, including denial of access to the accumulating "free funds." It also charged that Hancock had violated its fiduciary duties by holding the plan to the terms of a contract that was not particularly favorable in light of the prevailing high interest rates. The amended complaint alleged various contract and common law claims as well. The trustee sought damages for losses resulting from the alleged violations, removal of Hancock as fiduciary, and other equitable relief. Harris Trust and Hancock each filed motions for partial summary judgment on the issue of whether Hancock is a fiduciary under ERISA. Pet. App. A6-A7; J.A. 49-71.

The district court held that Hancock is not a fiduciary because GAC 50 is a "guaranteed benefit policy" under Section 401(b)(2) of ERISA, which provides that the assets received by an insurer under such a policy are not plan assets. Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract to the extent

[3] In 1988, the parties reached an agreement pursuant to which the plan removed $53 million from the pension administration fund. Pet. App. A25.

that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." The district court first concluded that GAC 50 is an "insurance policy or contract" because it "places the insurance risks on the insurer, not on the plan's covered employees." Pet. App. A53.[4] The district court next rejected Harris Trust's argument, premised on the plan's participation in the investment experience of Hancock's general account, that GAC 50 does not provide for "benefits the amount of which is guaranteed by the insurer." The court explained that "Harris Trust's argument rests on a misinterpretation of the word 'benefit' in the statute." *Id.* at A57. The court noted that "[e]ach time ERISA uses the word 'benefit,' it refers to the payments made to the employees themselves." *Ibid.* "Because GAC 50 provides for fixed payments to covered employees," the court held that "it is covered by the guaranteed benefit policy exception." *Id.* at A58.

The district court found support for its conclusion in Interpretive Bulletin (IB) 75-2, which the Department of Labor issued shortly after ERISA's enactment. IB 75-2 stated that "if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets." See Pet. Br. App. A100. Thus, the court reasoned, the Department of Labor had concluded shortly after ERISA's enactment that assets like those held by Hancock pursuant to GAC 50 are not plan assets. Pet. App. A61. Accordingly, Hancock is not a fiduciary because

[4] The district court explained that Hancock, among other things, "guarantees benefit payments to pre-1968 covered employees and their beneficiaries in fixed amounts, regardless of any increases in life expectancy tables and regardless of the investment experience of Hancock's general account and its corresponding credit to the [pension administration fund]," and also "guarantees that post-1968 eligible employees will receive fixed payments on retirement." Pet. App. A54.

ERISA defines a fiduciary as a person who manages plan assets. See 29 U.S.C. 1002(21)(A); Pet. App. A47-A48.

On that basis, the district court granted Hancock's motion for partial summary judgment on Harris Trust's ERISA claims. Pet. App. A62. In a separate opinion, the court later dismissed Harris Trust's contract and common law claims. *Id.* at A63-A87.

4. The Second Circuit reversed with respect to Hancock's status as a fiduciary under ERISA. Pet. App. A1-A18. While acknowledging that GAC 50 is a guaranteed benefit policy "at least to the extent it provides for benefits guaranteed by Hancock," *id.* at A8, the court of appeals concluded that GAC 50 is a guaranteed benefit policy only to that extent. It held:

> Although Hancock provides guarantees with respect to one portion of the benefits derived from the contract, it does not do so at all times with respect to all the benefits derived from the other, or free funds, portion. The non-guaranteed portion is dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides.

Id. at A8-A9. The court found primary support for its interpretation in the legislative history, noting that the Conference Report indicates that if a policy "guarantees basic payments but other payments may vary with, *e.g.*, investment performance," the variable portions "are to be considered as plan assets subject to the fiduciary rules." *Id.* at A9 (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 296 (1974)).

The court of appeals also relied on the Seventh Circuit's decision in *Peoria Union Stock Yards Co. Retirement Plan* v. *Penn Mutual Life Ins. Co.*, 698 F.2d 320, 327 (1983), which held that any funds that have not been converted to fixed annuities are plan assets. Pet. App. A9-A10. Correspondingly, the court rejected the interpretation by the Third Circuit in *Mack Boring & Parts* v.

Meeker Sharkey Moffitt, Actuarial Consultants, 930 F.2d 267, 273, 277 (1991). The Third Circuit, like the district court in this case, held that a general account contract that provides for "guaranteed benefits to plan participants at some finite point in the future" is a guaranteed benefit policy in its entirety, even if, prior to the conversion of contract funds to fixed annuities, the amount credited to the pension administration fund for a plan varies depending on the performance of the general account. Pet. App. A10-A11 (quoting 930 F.2d at 273).

The court of appeals recognized that the Interpretive Bulletin issued by the Department of Labor shortly after ERISA's enactment—and confirmed in a regulation adopted in 1986, 29 C.F.R. 2509.75-2—seemed to call for a contrary result. Pet. App. A12. However, relying on the fact that IB 75-2 related to prohibited transactions, the court found "no inconsistency in considering certain assets to be plan assets for general fiduciary duty purposes but not for prohibited transaction purposes." *Id.* at A13. Thus, the court concluded that the same assets should not be considered plan assets under Section 406 of ERISA, 29 U.S.C. 1106, which prohibits fiduciaries from using plan assets for various purposes, yet should be considered plan assets under Section 404 of ERISA, 29 U.S.C. 1104, which sets out the general duties of fiduciaries with respect to plan assets. The court also thought that two advisory opinions issued by the Department of Labor in 1978 and 1983—neither of which involved funds held in a general account for the purpose of providing fixed annuities—contradicted IB 75-2. Pet. App. A11-A12.[5]

[5] While disagreeing with the district court and holding that Hancock is a fiduciary with respect to some of the assets it holds pursuant to GAC 50, the court of appeals "agree[d] with the district court that the contract itself, GAC 50, is not a plan asset as to which Hancock has a fiduciary responsibility." Pet. App. A13. The court of appeals also agreed with the district court that Hancock had not violated the terms of GAC 50 in 1982 when it refused to pay additional "non-guaranteed benefits." *Id.* at A18.

Having divided GAC 50 into different components according to whether or not particular amounts credited to the pension administration fund under the contract were excess ("free") funds, the court of appeals reversed the judgment of the district court "to the extent that it determined that Hancock had no fiduciary duty with regard to the excess funds allocated to the payment of non-guaranteed benefits." Pet. App. A18. It therefore remanded the case for further proceedings consistent with the decision. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals should have affirmed the district court's decision, which reflects the Department of Labor's consistent interpretation of Section 401(b)(2) of ERISA. Affirmance of the court of appeals' judgment would upset long-standing practices by mandating changes in the manner in which insurers and pension plans have done business. We know of no sound basis for causing such disruption.

A. In 1975, shortly after ERISA was enacted, the Department of Labor issued IB 75-2, which stated that funds held by insurance companies in their general accounts are not plan assets. In 1978, the Department modified its position somewhat in Advisory Opinion (AO) 78-8A, which stated that general account funds are plan assets if they provide for the payment of variable annuities rather than fixed annuities. But the Department afterward reaffirmed IB 75-2 in regulations promulgated in 1986. Thus, the Department's position is that a "guaranteed benefit policy" is a contract pursuant to which an insurer holds assets in its general account to guarantee the payment of fixed annuities to plan beneficiaries.

In our view, the language of Section 401(b)(2)(B) is ambiguous. However, the Department's interpretation is

consistent with the text. Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." As the district court concluded, the contract at issue in this case (GAC 50) is "an insurance policy or contract," even though it has some characteristics of an investment contract, because Hancock has assumed significant risks in connection with its guarantee to provide benefits to plan participants and beneficiaries. Moreover, since all of the funds received by Hancock pursuant to GAC 50, along with the earnings attributable to those funds, have been available to provide for fixed annuity payments as long as they were held in Hancock's general account, it "provides for benefits the amount of which is guaranteed by the insurer."

B. The legislative history lends support to the Department of Labor's interpretation of Section 401(b)(2). The Senate bill had categorically provided that ERISA's fiduciary standards would not apply to assets held by insurance companies in their general accounts. While the Conference Committee revised that provision, we think that it probably intended only a relatively modest change, most likely to ensure that assets held in general accounts would be considered plan assets if they were to be used to provide variable annuities.

C. Harris Trust's position would lead to significant changes in the way insurance companies and pension plans do business, because insurance companies commingle the assets in their general accounts and use them for a variety of purposes, including paying the insurance company's own operating expenses. Those practices would be difficult to square with ERISA's requirement that plan assets must be used exclusively to provide benefits or to defray reasonable administrative expenses. It would also be difficult to reconcile the insurance industry's practices with ERISA's prohibited transaction rules, which bar

fiduciaries from using plan assets for a variety of purposes.

D. The Department of Labor's construction of Section 401(b)(2) warrants deference, because it was developed contemporaneously with ERISA's enactment and has been followed since that time. Contrary to the court of appeals' belief, the interpretation provided in IB 75-2 was not contradicted by AO 78-8A, but rather was modified in a manner that gives full effect to the statutory language. The Department has never disavowed IB 75-2, but instead repromulgated it in 1986. Furthermore, contrary to the court of appeals' suggestion, IB 75-2 cannot be limited to ERISA's prohibited transaction rules. It must also apply to ERISA's other fiduciary requirements, because there is neither a textual basis nor a sound policy reason to hold that the same assets are "plan assets" for purposes of Section 404 of ERISA (the general fiduciary duty provision), but not for purposes of Section 406 (the prohibited transaction provision).

ARGUMENT

AN INSURANCE COMPANY IS NOT A FIDUCIARY WITH RESPECT TO ASSETS HELD IN ITS GENERAL ACCOUNT THAT PROVIDE FOR THE PAYMENT OF FIXED ANNUITIES

This case involves the construction of Section 401(b)(2) of ERISA. That Section provides that the assets of a pension plan do not include assets held by an insurer pursuant to a "guaranteed benefit policy." Section 401(b)(2)(B) defines "guaranteed benefit policy" as "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." Section 401(b)(2) was drafted by the Conference Committee, and, like other provisions of ERISA that were written in conference, it is "perhaps * * * not a model of legislative drafting." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985).

Moreover, it is not possible to interpret the phrase "guaranteed benefit policy" in light of its prior usage in the industry, because the term was coined by the Conference Committee and had "never been a part of the insurance industry lexicon." Goldberg & Altman, *The Case for the Nonapplication of ERISA to Insurers' General Account Assets*, 21 Tort & Ins. L.J. 475, 482 (1986).

Unlike either party, we think the statutory definition of "guaranteed benefit policy" is ambiguous, and does not clearly answer the question presented by this case. In those circumstances, the meaning of Section 401(b)(2)(B) must be derived not only from its language, but also from the structure, history, and purposes of the Act. The government takes the view, supporting petitioner, that a "guaranteed benefit policy" includes an insurance contract pursuant to which assets are deposited in an insurer's general account to provide for the payment of fixed annuities. Moreover, it is the government's view that such a contract is a "guaranteed benefit policy" even if the contract also provides that the pension plan participates in the insurer's investment experience.[6] The court of appeals' narrower construction of Section 401(b)(2)(B)—that a contract is not a guaranteed benefit policy "to the extent that" it is "dependent upon the insurer's investment experience and therefore is variable with respect to the benefits it provides" to the plan, Pet. App. A9—also finds support in the statutory text and has some advantages as a matter of policy. But, as discussed more fully below, from ERISA's earliest days, the Secretary of Labor took the broad view, expressed in IB 75-2, that assets placed in a general account "shall not be considered

[6] The pension plan itself, however, is nonetheless an ERISA plan (see 29 U.S.C. 1003), subject to the reporting, vesting, and funding requirements set out in the Act. In addition, the plan's trustee is a fiduciary subject to all of ERISA's fiduciary requirements (see 29 U.S.C. 1103(a)), even if the insurance company from which the plan purchases annuities is not a fiduciary.

to be plan assets." Pet. Br. App. A100. That view, while modified to a limited extent in subsequent advisory opinions, was reconfirmed formally in 1986. Consistent with that view, the Department of Labor has brought no enforcement actions alleging that any of the many insurers that have held funds in their general accounts under contracts like GAC 50 were fiduciaries under ERISA. Compare *Bank America Corp.* v. *United States*, 462 U.S. 122, 130-131 (1963). In the absence of a strong justification, either in law or policy, for treating assets held by insurance companies in their general accounts as "plan assets" whenever the overall return to a pension plan varies with the investment experience of the insurance company, we see no reason to upset settled expectations and contractual relations that have built up over the years in reliance on the continued viability of that established (indeed contemporaneous) construction of the statute.

A. The Statutory Language Supports The Department Of Labor's Construction Of Section 401(b)(2)

1. The Department of Labor published an interpretation of Section 401(b)(2) shortly after ERISA went into effect in 1975. That interpretation, designated IB 75-2, stated that "[i]f an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets." See Pet. Br. App. A100. Three years later, AO 78-8A modified IB 75-2 somewhat by concluding that assets held in a general account are "plan assets" if they are used to provide variable annuities rather than fixed annuities. In AO 78-8A, the Department recognized that it had stated categorically in IB 75-2 that general account assets are not plan assets, but it explained that "IB 75-2 was based in part upon the Department's understanding that the various state laws which regulate

insurance companies prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset account." Pet. Br. App. A107. IB 75-2 was reissued in 1986. See 29 C.F.R. 2509.75-2; Pet. App. A97. Thus, the Department interprets Section 401(b)(2) to mean that assets deposited in an insurance company's general account pursuant to an insurance contract providing for the payment of fixed annuities to beneficiaries of a pension plan are not plan assets.

2. The language of Section 401(b)(2)(B) is consistent with the Department of Labor's interpretation, which the Third Circuit in *Mack Boring* concluded is the "more logical" reading of the statutory text. 930 F.2d at 271. Like the district court in this case, the Third Circuit first considered, as IB 75-2 also requires, whether the contract at issue was "an insurance policy or contract" under Section 401(b)(2)(B)'s definition of a "guaranteed benefit policy."[7] The Third Circuit concluded that the contract was an insurance policy because it "involve[d] a guarantee that at least some fraction of the benefits will be payable in fixed amounts," and thus assured the shifting of some risk to the insurer. *Id.* at 272 (quoting *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 71 (1959)). In this case, the district court likewise concluded that the contract at issue is an insurance contract characterized by the bearing of "substantial risks" by Hancock. Pet. App. A54.

[7] The contract at issue in *Mack Boring* was a standard "deposit authorization contract," which is similar to the "immediate participation guarantee" contract at issue here. K. Black & H. Skipper, *Life Insurance, supra*, at 496. Under the deposit authorization contract in *Mack Boring*, funds were deposited in an insurance company's general account, and the pension plan participated in "the investment, mortality or expense experience of the insurer," although with a minimum guarantee of interest. 930 F.2d at 268. "The insurance company [was] contractually bound to use the entire accumulation fund, including accrued interest and without market value change, to purchase annuities for plan participants upon their retirement, utilizing a schedule of annuity purchase rates specified in the contract." *Id.* at 269.

The court of appeals concurred that the contract is a "guaranteed benefit policy" (and therefore an "insurance policy or contract") "at least to the extent it provides for benefits guaranteed by Hancock." *Id.* at A8.[8]

There is no question that the pension plan bears some risk depending on the performance of Hancock's general account, and that GAC 50 therefore has some characteristics of an investment contract. But we agree with the district court that GAC 50 is also an insurance contract. An insurance company bears a substantial risk throughout the life of an IPG contract such as the one at issue in this case. Once the "active phase" of the IPG contract terminates, the insurance company bears the investment, mortality, and expense risks associated with providing the fixed annuities it has promised to pay. And, "[o]f course, the company is under a substantial risk during the active status of the contract, since it has provided a guaranteed price structure that the employer can unilaterally decide to take advantage of at any time that it feels the probable future course of investment, mortality, and expense risks will be such that it will be to its advantage to shift the risk to the life insurance company." K. Black & H. Skipper, *Life Insurance, supra*, at 497. Thus, as the district court recognized, Hancock guarantees the payment of all retirement benefits earned under the plan before 1968, as well as the payment of all benefits to plan participants who retired by 1977. Pet. App. A54. Moreover, the plan can trigger the issuance of fixed annuities at the rates set in GAC 50 by requesting Hancock to guarantee the payment of additional future benefits up to the point that the liabilities of the pension administration fund (plus five percent) equal the balance in the fund, thereby terminating GAC 50's "active phase." See page 3, *supra*.

[8] By contrast, in *Peoria Union* the plan bore the entire investment risk, and the Seventh Circuit deemed the contract at issue to be an investment contract and not an insurance contract, both for purposes of ERISA and the federal securities laws. 698 F.2d at 324-327.

3. The Department's construction next considers whether the insurance contract "provides for benefits the amount of which is guaranteed by the insurer" under the definition of "guaranteed benefit policy" in Section 401(b)(2)(B). Central to this analysis is the conclusion that the term "benefits" in Section 401(b)(2)(B) refers to the payments made to the individual participants and beneficiaries of the plan itself, rather than to the return credited to the pension plan. See Pet. App. A57. As the Third Circuit explained in *Mack Boring*, 930 F.2d at 273, it is clear that "the term 'benefit,' when used in ERISA, uniformly refers only to payments due the plan participants or beneficiaries." See also Pet. App. A57; see, *e.g.*, 29 U.S.C. 1002(7), 1002(8). Under ordinary principles of statutory construction, the word "benefits" should be read to have the same meaning here, unless there is evidence that Congress intended the word to carry a different connotation in this context. *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992). There is no such indication. What is more, the word "benefits" is customarily used in the insurance industry to mean payments to beneficiaries. See Goldberg & Altman, 21 Tort & Ins. L.J. at 482.

This construction also gives full meaning to the phrase "provides for" in Section 401(b)(2)(B). The principal dictionary definition of "provide" is "[t]o furnish; supply." *The American Heritage Dictionary* 1053 (1976); accord *Black's Law Dictionary* 1388 (1968) ("[t]o make, procure, or furnish for future use, prepare"). Used with "for," the word "provide" can mean "[t]o take measures in prepara-tion." *The American Heritage Dictionary*, *supra*, at 1053. Accordingly, the natural construction of "provides for" in Section 401(b)(2)(B) encompasses benefits guaranteed in the future, especially because any other reading would appear to render "for" superfluous. As the Third Circuit stated in *Mack Boring*, 930 F.2d at 273, "it is enough that the * * * contract 'provided' guaranteed benefits to plan

participants at some finite point in the future," by making all the funds associated with the contract available for that purpose. "Section 401(b)(2)(B) does not, on its face, require that the benefits contracted for be delivered immediately," and there is no reason to "read into the statute such a requirement." *Ibid.*[9]

The foregoing construction is also consistent with the connecting phrase "to the extent that." If the word "benefits" is understood to mean payments to individuals, then it becomes clear that an insurance contract is a guaranteed benefit policy "to the extent that" the benefit payments to individuals that the contract "provides for" are guaranteed in amount, as are fixed annuity payments. On the other hand, "to the extent that" a contract provides for variable annuity payments to individuals (either at present or in the future), then the contract is not a "guaranteed benefit policy." This was the interpretation adopted by the Third Circuit, which concluded that "[t]he phrase 'to the extent' was probably added to 'distinguish a

[9] We recognize that the guarantees associated with the provision of fixed annuities in the future have less value than the guarantees associated with already purchased annuities, since, while the insurer can guarantee the purchase price and payout of an annuity purchasable in the future, it does not guarantee the total amount of assets that will be available for the purchase or that the guaranteed price will be reasonable at all times in the future. Significantly, however, this phenomenon is true whether or not the contractholder participates in the investment experience of the insurer, because external economic conditions alone (*e.g.*, inflation) will affect the value of the guarantees. Moreover, the statute does not distinguish between levels of guarantees. Section 401(b)(2)(B) instead provides that a contract is a "guaranteed benefit policy" "to the extent that [it] provides for [guaranteed] benefits." Accordingly, application of the exception should not turn on whether, "in hindsight," the particular guarantees turned out to be a good deal for the plan. *Mack Boring*, 930 F.2d at 274, citing Pet. App. A56 ("[a]lthough interest rates have increased since 1968, they have been known to revert to their previous levels or lower, and, in that event, Hancock would still be obliged to guarantee those additional benefits").

contract under which fixed benefit annuity payments are promised from a contract under which the amount of some or all benefit payments is not guaranteed, such as a variable annuity contract under which the amount of benefit payments varies with the performance of a particular separate account.' " *Mack Boring*, 930 F.2d at 274 (quoting Goldberg & Altman, 21 Tort & Ins. L.J. at 483). In the Third Circuit's view, so long as all the assets are available to purchase fixed annuities for individual beneficiaries, it does not matter that the same assets provide a variable aggregate return to the plan in the interim. 930 F.2d at 274.

That interpretation is further supported by the second sentence of Section 401(b)(2)(B), which states that a guaranteed benefit policy "includes any surplus in a separate account, but excludes any other portion of a separate account." 29 U.S.C. 1101(b)(2)(B).[10] Separate accounts held by or for pension plans customarily (but not always) provide for variable benefits, and thus they typically serve exclusively as investment vehicles. It is therefore entirely logical that Congress should treat most assets held in separate accounts as plan assets, and subject insurance companies to ERISA's fiduciary duty requirements with respect to the management of those accounts. The fact that the second sentence of Section 401(b)(2)(B) is addressed to separate accounts (and excludes them almost entirely from the definition of "guaranteed benefit policy") supports the conclusion that the first sentence of Section 401(b)(2)(B) (which contains the definition of "guaranteed benefit policy") is addressed to general accounts.

[10] "Surplus" is money placed in an account by an insurance company from its own general funds. See H.R. Conf. Rep. No. 1280, *supra*, at 297 ("to the extent that insurance companies place some of their own funds in these separate accounts to provide for contingencies, this separate account 'surplus' is not to be subject to the fiduciary responsibility rules").

A standard IPG contract clearly "provides for benefits the amount of which is guaranteed by the insurer" under the Department of Labor's construction of that phrase because, under such a contract, the premiums received by the insurance company and placed in its general account are to be used to guarantee the payment of fixed annuities. In the case of GAC 50, we do not think that a different result should be reached for the period between 1977 and 1982 insofar as some of the "free funds" held in Hancock's general account (and allocated to the pension administration fund for the Sperry plan) were used to pay so-called "non-guaranteed benefits." That option does not change the essential character of the contract as a "guaranteed benefit policy," because at any time while held in the general account, all of the funds were available to provide fixed annuities to retirees, and Harris Trust could have triggered the issuance of the annuities by requiring Hancock to guarantee additional payments to individual plan beneficiaries. Accordingly, GAC 50 was a "guaranteed benefit policy" under Section 401(b)(2) after 1977, even though it allowed the plan to remove some of the free funds to make benefit payments while the contract was in its "active phase."[11]

[11] Although we support petitioner Hancock in this case, we do not agree with the position, not previously briefed in this case but suggested by the American Council of Life Insurance (ACLI) in its amicus brief in support of the petition for a writ of certiorari (at 17 n.21), that Hancock is an "operating company" within the meaning of the plan asset regulation, 29 C.F.R. 2510.3-101(a)(2)(i), (c) (reproduced at Pet. App. A99-A100, A102). The plan asset regulation does not apply in this case, because GAC 50 does not constitute an investment in Hancock itself, as would be required by the plan asset regulation. 29 C.F.R. 2510.3-101(a)(2). Moreover, if the ACLI's position were adopted, the plan asset regulation would have the effect of reading Section 401(b)(2) out of ERISA, because funds paid to insurance companies would not, by virtue of the "operating company" regulation, be plan assets.

B. The Department Of Labor's Interpretation Of Section 401(b)(2) Is Consistent With The Legislative History

Although not definitive, the relatively scant legislative history lends support to the Department of Labor's construction. The Senate bill that preceded ERISA's enactment would have exempted all general account assets from treatment as plan assets: that bill provided that its fiduciary standards "shall not apply to * * * funds held by an insurance carrier unless that carrier holds funds in a separate account." S. 4, 93d Cong., 1st Sess. § 511 (1973). Had that provision been retained, there would be no doubt that general account contracts, such as the one at issue in this case, do not impose fiduciary obligations on insurers. Like respondent Harris Trust (Br. in Opp. 8), we presume that, because the Conference Committee rewrote the provision, Congress intended to accomplish a different result. Cf. *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended").

In our view, however, it is probable that Congress intended to accomplish only a rather modest tightening of the Senate proposal. Specifically, we believe that Congress most likely adopted the language in the definition of "guaranteed benefit policy" in Section 401(b)(2) in order to close a potential loophole that might have permitted insurers to avoid fiduciary responsibility while offering general account contracts that provided variable benefits to plan participants. Although contracts tied to the general accounts of insurance companies usually provide for the payment of fixed annuities, as State law generally requires (see AO 78-8A, Pet. Br. App. A107), there is no inherent reason why general account contracts could not provide for the payment of variable annuities instead.

Unfortunately, the Conference Report does not shed light on what motivated the Conference Committee to

rewrite the provision. The report simply states (1) that "[a]n insurance company * * * is not considered to hold plan assets if a plan purchases an insurance policy from it, to the extent that the policy provides payments guaranteed by the company"; (2) that if "other payments may vary with, *e.g.*, investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed"; and (3) "insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets." H.R. Conf. Rep. No. 1280, *supra*, at 296-297. The Conference Report's use of the word "payments" rather than "benefits" and its reference to the "variable part of the policy" make more plausible the court of appeals' inference that Congress was thinking of payments to plans rather than payments to plan beneficiaries, and intended to treat the portion of a pension administration fund that represents return on investment as "plan assets." But if that is what Congress meant, it presumably would have used "payments" rather than "benefits" in the text of Section 401(b)(2), not just in its legislative history. For that reason, we, like the Third Circuit, think that the Conference Report used "payments" to mean "benefits" paid to individuals in accordance with the typical way in which insurance companies "guarantee" payments under their contracts, and thus simply was distinguishing between contracts that provide for fixed annuities and contracts that provide for variable annuities. *Mack Boring*, 930 F.2d at 275. If, by contrast, the Conference Committee had intended to make a dramatic change from prior practice—by subjecting to ERISA's fiduciary requirements the vast amounts held by insurance companies under general account contracts such as the one at issue in this case simply because the return to the plan depends on investment experience—the Conference Report presumably would have mentioned that

change expressly. *Chisom* v. *Roemer*, 111 S. Ct. 2354, 2364 & n.23 (1991).

Furthermore, shortly after ERISA's enactment, Assistant Secretary of Labor Paul Fasser testified about IB 75-2 before the House oversight committee, making clear that the Department interpreted Section 401(b)(2) broadly, such that assets held in general accounts are ordinarily not considered to be plan assets. *Oversight on the Employee Retirement Income Security Act of 1974: Hearings on Public Law 93-406 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 390-391 (1975) [*1975 Hearings*]; see Pet. App. A58-A59. No member of the committee questioned the wisdom or correctness of that interpretation. Coming only seven months after the enactment of ERISA, the reaction of the oversight committee suggests that IB 75-2 was consonant with congressional intent and a permissible reading of the statute. See *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979).

C. Policy Considerations Counsel Against An Interpretation Of Section 401(b)(2) That Would Disrupt Established Practices In The Industry

The protections provided by ERISA do not extend solely to the treatment of participants and beneficiaries, to the exclusion of pension plans.[12] But it does not follow that Congress meant to treat as plan assets funds held in general account insurance contracts that provide variable investment returns to pension plans, while guaranteeing

[12] Congress enacted ERISA "to protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b). To that end, ERISA was intended "to improve the equitable character and soundness of private pension plans," H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), and "is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income," H.R. Rep. No. 807, 93d Cong., 2d Sess. 8 (1974).

the payment of fixed annuities to plan beneficiaries. Rather, it is reasonable to infer from Congress's treatment of the insurance industry elsewhere in the Act that Congress did not regard that industry to be especially prone to the problems of asset mismanagement that gave rise to ERISA. Thus, ERISA exempts certain "insurance contract plan[s]" from its funding requirements (29 U.S.C. 1081(a)(2), (b)) and exempts all insurance contracts from trust requirements (29 U.S.C. 1103(b)(1), (2)), and the Conference Report expresses the understanding that investments by insurance companies generally meet the Act's diversification requirements. H.R. Conf. Rep. No. 1280, *supra*, at 305. Moreover, one reason for this different treatment of insurance contracts may be that ERISA saves state regulation of insurance from statutory preemption. See 29 U.S.C. 1144(b)(2)(A). As a result, relieving insurance companies from some of ERISA's requirements does not leave assets invested in insurance companies entirely unprotected.[13]

[13] We do not think, however, that the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, precludes the application of ERISA to an insurer's actions under a general account contract, and leaves regulation exclusively to the States. That argument was correctly rejected by the district court. Pet. App. A27-A35. Nothing in the McCarran-Ferguson Act generally exempts "the business of insurance" from ERISA coverage. Rather, the McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b). ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and specifically relates to the business of insurance. Indeed, as explained above (note 6, *supra*), ERISA subjects a guaranteed benefit policy to the other requirements of the Act, even if the insurance company is not held to fiduciary standards. Moreover, dual regulation under ERISA and state law is not an impossibility. Many requirements are complementary, and in the case of a direct conflict, federal supremacy principles require that state law yield. Pet. App. A29-A31.

At the same time, the interpretation of ERISA advanced by Harris Trust could significantly change the way insurance companies do business under general account contracts, including those with pension plans. As discussed above, monies paid into general account contracts are not segregated from other accounts, but are used for general corporate purposes, such as paying the insurance company's operating expenses and meeting obligations to other contractholders. Under those circumstances, it would be very difficult for insurance companies to meet ERISA's fiduciary standards. For example, ERISA imposes a duty of undivided loyalty to plan participants that cannot easily be squared with the use of general account assets for corporate objectives. Insurance companies could be required to justify many routine expenditures for corporate facilities, for the benefit of other contractholders, and for other purposes, in order to ensure compliance with ERISA's requirement that fiduciaries act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. 1104(a)(1)(A). It is unlikely that insurance companies could make the required showings as long as the assets were maintained in general corporate accounts and used for a multiplicity of corporate purposes.

Insurance companies also would have to comply with ERISA's prohibited transaction provisions. See 29 U.S.C. 1106; 26 U.S.C. 4975. Thus, as the Assistant Secretary of Labor stated in 1975, under Harris Trust's reading of Section 401(b)(2) an "insurance company could not invest its premium receipts in bonds or equity securities issued by any of the employers contributing to the policyholder plan, it could not allow any of these employers to lease space in a building on which it held a mortgage, and it could not purchase goods, services, or facilities from any one of those employers." *1975 Hearings, supra,* at 390-391. While "these restrictions might have been manageable if

the insurance company insured the benefits of only one or a few plans, * * * some of the large carriers have sold policies to thousands of plans." *Ibid.* After consultation with the Internal Revenue Service, and applying "common sense," the Department of Labor issued IB 75-2 to make clear that it did not construe Section 401(b)(2) to require such results. *Ibid.*[14]

While it is not clear what degree of disruption would be caused by holding insurance companies to be fiduciaries under such contracts, there is little doubt that the disruptions and costs would be significant, both in terms of the administrative changes the companies would be forced to undertake (*e.g.*, segregation of plan-related assets into segmented or separate accounts, and re-allocation of operating costs to other policyholders) and in terms of the considerable exposure to the ensuing litigation that would be brought by pension plans and others alleging fiduciary breaches.[15]

At the same time, we recognize that a holding that assets held by insurance companies pursuant to contracts like GAC 50 are "plan assets" would provide significant added legal protections against losses by pension plans,

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[14] Under ERISA, insurers may apply for individual or class exemptions from the prohibited transaction rules. See 29 U.S.C. 1108; 29 C.F.R. 2570.30-2570.52. The Secretary may grant such exemptions for transactions that would otherwise be prohibited under ERISA, but the standards for doing so are fairly stringent. In particular, the Secretary must find that such an exemption would be "(1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan." 29 U.S.C. 1108(a).

[15] Because of the disruptions that would result from a ruling that (contrary to the interpretation of Section 401(b)(2) provided by the Department of Labor) insurance companies are fiduciaries under ERISA with respect to funds held in their general accounts to provide for payment of fixed annuities, if this Court agrees with the court of appeals, it should direct the lower courts to consider on remand whether the ruling should have only prospective effect. Compare *American Trucking Ass'ns, Inc.* v. *Sheiner*, 483 U.S. 266, 297-298 (1987).

because ERISA imposes restrictions not currently provided by contract and insurance law. But without disputing that the contract in this case may have proved to be onerous to Harris Trust in certain respects, there has been no systematic showing of a pressing need to reconsider on policy grounds the government's long-standing interpretation of the scope of the guaranteed benefit policy exception. Thus, it remains our view that the fiduciary standards and associated enforcement provisions of ERISA are not available to rescue plan sponsors and trustees, who are themselves fiduciaries, from the adverse consequences of their contractual choices.

D. The Department Of Labor's Construction Of Section 401(b)(2) Is Entitled To Deference

Although the court of appeals recognized that Interpretive Bulletin 75-2 stated that assets held by an insurance company in a general account, pursuant to a contract of insurance, are not plan assets, the court believed that IB 75-2 could be distinguished from this case. See Pet. App. A12-A13. Specifically, the court noted that the Department determined in IB 75-2 that assets like those at issue here are not plan assets for purposes of ERISA's prohibited transaction provisions, and suggested that a different rule could apply with respect to ERISA's general fiduciary duty provisions. Pet. App. A13. Contrary to the court of appeals' view, we do not see how the same assets can be considered plan assets for purposes of the fiduciary duty provisions but not for purposes of the prohibited transaction provisions. There is no textual basis for such a distinction. To the contrary, Section 401(b)(2) states that the assets of a "guaranteed benefit

policy" are not plan assets, and nowhere suggests that they may be plan assets for some purposes but not others.[16]

Thus, IB 75-2 necessarily reflects an interpretation of Section 401(b)(2) as exempting the assets described by it from all of ERISA's fiduciary rules, including those set out in the prohibited transaction provisions. In fact, in response to an inquiry concerning ERISA's general fiduciary requirements, the Department in 1975 issued a one-page advisory opinion stating that "[o]ur latest interpretative bulletin, ERISA IB 75-2, * * * makes clear that when a plan purchases a policy or policies on an insurance company's general assets account, the plan assets consist of the policy, and not the underlying assets of the insurance company." AO 75-79, Pet. Br. App. A103. Thus, 18 years ago the Department rejected the distinction proposed by the court of appeals.

The court of appeals incorrectly thought that two advisory opinions issued by the Department of Labor contradicted the interpretation set out in IB 75-2. Pet. App. A11-A12. As we have already noted, the first of those advisory opinions, AO 78-8A, clarified that, consistent with IB 75-2, assets held in an insurance company's general account are plan assets if they provide for the payment of variable annuities rather than fixed annuities, and explained that the Department had been under the erroneous impression in 1975, when it issued the Interpretive Bulletin, that general account assets were always used to provide for the payment of fixed annuitites. AO 78-8A, Pet. Br. App. A107. Thus, AO 78-8A was not truly contradictory to IB 75-2, and it is certainly not incon-

[16] Moreover, the purposes of the general fiduciary duty provisions of Section 404 of ERISA and the prohibited transaction provisions of Section 406 of ERISA are complementary. The transactions prohibited by Section 406 of ERISA—such as the sale or exchange of property between a plan and a plan sponsor—are the sort of transactions that have a high potential for abuse, and frequently result in fiduciary breaches. See *Donovan* v. *Cunningham*, 716 F.2d 1455, 1464-1465 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984).

sistent with the Department's position in this case. In fact, AO 78-8A illustrates our understanding of the meaning of the phrase "to the extent that" in Section 401(b)(2)(B).

Nor is AO 83-51A in tension with the Department's other pronouncements or its position in this case. That advisory opinion dealt with a situation that was the converse of the one considered in AO 78-8A: the use of separate accounts to provide entirely fixed contractual obligations. The account at issue in AO 83-51A provided that "neither the amount payable (or credited) to the plan or to any participant or beneficiary of the plan (including an annuitant) is affected in any way by the investment performance of the separate account." AO 83-51A, Pet. Br. App. A112. Because the second sentence of Section 401(b)(2)(B) states that, except for any surplus in a separate account, "any other portion of a separate account" constitutes plan assets, the question in AO 83-51A was whether the account at issue—which unquestionably was separate (segregated) from the insurer's general account—was a "separate account" within the meaning of Section 3(17) of ERISA, 29 U.S.C. 1002(17). That definition does not provide that a "separate account" is any insurance account other than a general account, but instead provides that a separate account is "an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company." The Department concluded that the account at issue, while segregated from the insurer's general account, was not a "separate account" within the meaning of Section 3(17) because the return to the account was fully assured—*i.e.*, the account experienced no gains or losses that affected either the plan or its participants. That is a reasonable interpretation of

Section 3(17). In any event, it does not call into question the Department's conclusion that assets held in a general account to provide for payment of fixed annuities are not plan assets.

The Department's established construction of Section 401(b)(2), embodied in the various rulings and statements discussed above, is reasonable and entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Indeed, deference is particularly appropriate here because the agency's most relevant pronouncement was issued contemporaneously with the passage of ERISA by those charged with setting the administrative and civil enforcement mechanisms in motion, and because it was brought to the attention of an oversight committee of the Congress that passed the Act, and was not questioned by any member of that committee. See *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408-409 (1961).[17]

In *Massachusetts* v. *Morash*, 490 U.S. 107, 116 (1989), this Court noted that the Secretary of Labor "is specially authorized to define ERISA's 'accounting, technical, and trade terms.'" See 29 U.S.C. 1135. The Court therefore gave deference in *Morash* to the Department's interpretation of the term "vacation benefits" in 29 U.S.C. 1002(1). Even though the Court acknowledged that the statutory provision "may surely be read to encompass any form of regular vacation payments to an employee" (490 U.S. at 114), the Court upheld the Department's "payroll practices" regulation, which provides that ERISA covers only those vacation benefits that are provided through funds

[17] The Department's failure to provide advice to the court of appeals (see Pet. App. A3-A4) does not suggest that its views are not entitled to deference. The facts of this case are complicated, the language of Section 401(b)(2) is not crystal clear, and subjecting general account assets to regulation under ERISA concedely would have some advantages for plan participants and beneficiaries. But the contract at issue is a "guaranteed benefit policy" under the Department of Labor's long-standing interpretation of that technical term.

such as those maintained for workers in the construction and longshore industries. The Court observed that a contrary interpretation that extended ERISA's coverage beyond pooled vacation trusts would upset various settled practices, without any reason to believe that Congress intended such consequences. *Id.* at 118-119. So too here. "Guaranteed benefit policy" is a technical term under ERISA, and the Court should defer to the Department's reasonable interpretation of that term rather than disrupt settled practices, in the absence of any reason to believe that Congress intended the far-reaching consequences the court of appeals' and respondents' position would produce.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1993

No. 92-1074 (9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust No. 2,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1074

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust No. 2,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE FOR LIFE INSURANCE COUNCIL OF NEW YORK SUPPORTING PETITIONER

STATEMENT OF INTEREST

The Life Insurance Council of New York, Inc. ("LICONY") represents 63 life insurance companies located in the state of New York.[1] LICONY addresses areas of concern to the New York life insurance industry before legislative and judicial bodies. One area of particular concern is the treatment under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, of general account contracts issued by life insurance companies to fund pension plans.[2]

[1] Counsel for Petitioner and Respondent have consented to LICONY's filing in letters filed herewith.

[2] An insurance company's general account is its operating account, whose assets are used to pay the insurance company's op-

Assets invested by private pension plans as of 1991 exceeded \$2.4 trillion. American Council of Life Ins., *1992 Life Insurance Fact Book* 56 (1992). Approximately 31 percent of that amount—about \$746 billion—was held by life insurance companies. *Id.* Over 45 percent of the assets and reserves held by life insurance companies for private pension plans in 1991 were held under group annuity general account contracts. *Id.* at 58.

Under *Harris Trust & Savs. Bank v. John Hancock Mut. Life Ins. Co.*, 970 F.2d 1138 (2d Cir. 1992) [hereinafter "*Harris Trust*"], issuance of such a group annuity general account contract to a pension plan subjected the insurance company's general account to ERISA's fiduciary standards. This decision is contrary to the language of ERISA and the consistent administrative interpretations of the statute since its enactment nearly 20 years ago. The effect of the decision, if allowed to stand, will be to subject the general accounts of life insurance companies—that is, all of the operating assets of life insurance companies—to inherently inconsistent and irreconcilable systems of state and federal regulation.

LICONY's members are regulated under New York law, the same law that applies to the contract at issue in this case. The membership of LICONY includes many of the largest issuers of pension funding contracts and therefore represents many of the companies that stand to be most affected by the outcome of this case. From this perspective, LICONY offers to the Court its legal arguments for reversing that portion of the holding in *Harris Trust* that would subject insurance company general account assets to coverage under ERISA.

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erating expenses, such as salaries and rent, as well as liabilities under contracts issued by the insurance company—so called "general account" contracts. Insurance companies also issue contracts supported by assets held separately from the general account—so called "separate account" contracts.

SUMMARY OF ARGUMENT

At issue in this case is whether insurance company general account assets will be subject to the fiduciary standards of ERISA whenever an insurance company issues a general account contract to a pension plan covered by ERISA.

The business of insurance is risk management—that is, pooling large numbers of risks and satisfying liabilities resulting from those risks from a common fund. New York and every other state already regulate the business of insurance to require that insurance companies have sufficient assets to cover the risks they insure. This state regulation is premised on the fact that each insurance company general account holds assets that may be used to satisfy the liabilities of the insurer on a non-segregated basis.

In contrast, ERISA requires a plan fiduciary to manage a segregated pool of plan assets solely for the benefit of the participants in one plan. State insurance regulation and ERISA fiduciary rules are thus inheretly incompatible. In many instances, moreover, compliance with state insurance rules would require an insurance company to violate ERISA's fiduciary rules, and vice versa.

The *Harris Trust* decision failed to take into account the practical difficulties raised by dual regulation under state insurance law and ERISA, and the lack of any evidence in ERISA and its legislative history that Congress intended to alter the operation of the entire insurance industry by subjecting it to a system of federal regulation that inevitably conflicts with the industry's explicit obligations under state law.

The Second Circuit held that contracts of the type issued by the Petitioner are not covered completely by ERISA's provision for guaranteed benefit policies. LICONY disagrees with that holding. In LICONY's view, section 401(b)(2) of ERISA serves as a safe har-

bor for contracts of the type at issue here. But even if the Court interprets this provision differently, a general account contract is exempt from treatment as plan assets under the legal principles embodied in the Department of Labor's regulation defining the term "plan assets" for purposes of ERISA's fiduciary rules.

The plan assets regulation provides that a plan investment that establishes a debtor/creditor relationship does not constitute an investment in the underlying assets of the company issuing the investment. Further, even a plan's equity investment in a company does not make the company's assets plan assets as long as the company is an "operating company," that is, a company that does not exist solely as a surrogate for the delegation of plan asset investment authority. General account contracts meet both of these requirements: they establish a debtor/creditor relationship under state law, and they constitute investments in insurance companies, which meet the definition of operating companies.

Because insurance company general account contracts are either explicitly exempt from plan assets treatment under ERISA, or under the Department of Labor's plan assets regulation, or both, that portion of the *Harris Trust* decision that requires their treatment as plan assets should be overturned.

I. THE BUSINESS AND REGULATION OF INSURANCE

The effect of the Second Circuit's decision extends far beyond the contract at issue in this case. To understand the far-reaching results of this decision and why that result is contrary to ERISA, it is necessary to consider the business and regulation of insurance companies and the contracts that they issue.

A. Life Insurance Companies Are Engaged In The Management Of Risk, And Hold All Assets In A Collective Fashion To Satisfy The Company's Obligations.

The principal business of insurance companies is the management of various types of risk. A person or entity purchasing a contract from an insurance company does so to transfer some or all of the risk insured against to the insurer. J. L. Athearn, S. T. Pritchett, J. T. Schmit, *Risk and Insurance* 50 (6th ed. 1989); C. A Williams, Jr. & R.M. Heins, *Risk Management and Insurance* 246 (6th ed. 1989).

An insurance company accepts risks in return for premiums, and then manages those risks through a variety of techniques, including spreading risks over a large number of similarly situated insureds and accumulating a fund to ensure the company's ability to pay in the event that a risk is realized. Athearn at 50; Williams & Hein at 246; R. I. Mehr, *Fundamentals of Insurance* 37-38 (2d ed. 1986).

To provide these risk management services, insurance companies engage in a variety of business-related activities, and they perform all of the functions typical of operating businesses. The company hires employees, pays taxes, owns or leases office buildings, purchases office equipment and furniture, and pays dividends to its owners.

All of these activities are carried out through the insurance company's general account. The general account is not a pooled investment fund held for the benefit of policyholders. Rather, it consists of all of the assets held by the insurance company in the operation of its general business of risk management. Premiums, fees, and other payments for life, health, and annuity products, and for related services, are placed in the general account, invested, and used by the company to pay operating expenses, policy claims, and returns to owners. These assets are not segregated by policyholder or by line of business. Instead, all assets in the general account are avail-

able to satisfy all of the obligations of the general account. K. Huggins, *Operations of Life and Health Insurance Companies* 301 (1986).

B. General Account Contracts Used For Pension Plan Funding Were Developed To Meet The Demands of Pension Plans By Providing Participation In The General Account.

The majority of general account insurance contracts issued by U.S. life insurance companies are "participating." In participating contracts, the contractholder participates in the company's experience, that is, the general account's experience. By sharing a portion of the company's risks, the participating contractholder expects more favorable results.

When group annuity contracts were first developed, most of the insurance business in the United States was written by mutual life insurance companies. Indeed, when Congress was considering pension reform legislation in 1973, mutual companies held two-thirds of all assets held by U.S. life insurance companies. Institute of Life Ins., *Life Insurance Fact Book 1974,* at 89 (1974). Mutual company group pension products, like most insurance products issued by mutual companies, almost always participated in the experience of the general account. K. Black, Jr. & H. D. Skipper, Jr., *Life Insurance* 503 (11th ed. 1987). Stock insurance companies also issue group pension products that typically include a participation feature. *Id.* It is therefore common for all group pension contracts to participate in the experience of the general account.

At the time Congress was considering the pension reform proposals that led to the passage of ERISA, there were three major types of group pension contracts—group deferred annuities, deposit administration contracts, and immediate participation guarantee contracts. The types and levels of guarantees in these different

types of contracts varied. However, all three provided for the ultimate payment of guaranteed benefits to plan participants. It was against this background of established practice that Congress enacted the provisions of ERISA at issue in this case.

C. Both At The Time of ERISA's Enactment And Today, New York, As Well As The Other States, Regulate The Business of Insurance.

All of the states have laws regulating the operations and activities of insurance companies. Black & Skipper at 503. Because most major insurance companies that issue pension funding contracts are regulated by New York insurance law, which also governs the policy at issue in this case, we focus our analysis on New York law. The insurance laws of the other states have similar objectives and use similar approaches to achieve those objectives.

1. New York state insurance law is designed in the first instance to ensure insurance company solvency.

The financial activities and condition of life insurance companies are subject to comprehensive regulation under New York law and the regulations issued by the Superintendent of Insurance, who is responsible for the administration and enforcement of the state's insurance law. N.Y. Ins. Law §§ 201, 301 (McKinney 1985). The primary purpose of this regulatory scheme is to ensure the solvency of companies and their ability to pay all policy claims when due. *The Life Insurance Law of New York* 32-33 (1989).

New York's stringent statutory accounting rules are oriented conservatively toward the maintenance of company solvency. For example, only "'admitted" (generally, investment) assets may be counted in determining solvency. Similarly, detailed rules are provided for valu-

ing different classes of assets, and contingency or valuation reserves are established to smooth fluctuations in the value of assets. *Id.* at 33.

In the same vein, the rules for valuing liabilities require use of separate minimum interest rates and prescribed mortality or morbidity tables and reserve valuation methods for each of many separate liability classifications. *Id.* at 34.

New York law also provides detailed rules relating to the investment of general account assets. Generally, the rules are intended to ensure diversification of assets, prudent investment practices, and matching of asset and liability durations. Under N.Y. Ins. Law section 1405(a) (McKinney Supp. 1993), an insurance company may invest no more than 2 percent of its admitted assets in any one company, no more than 10 percent of its admitted assets in foreign securities, and no more than 20 percent of its admitted assets in the aggregate in equity investments. Similarly, no more than 40 percent of general account assets may be invested in certain types of real property, personal property, and other equity investments.

All of these rules are aimed at the maintenance of the company's solvency to protect all of the company's policy holders, without distinction among the different types of policies issued or the nature of the different kinds of policyholders. Thus, a life insurance company's financial statement does not show assets and liabilities separately for each customer, policy type, or class of business. Instead, liabilities and assets are stated in the aggregate, recognizing that claims against the company, regardless of their source, are claims against the general account. Huggins at 301. Similarly, there are no separate funds for reserves and capital; reserves are simply accounting liabilities of the company, and capital and surplus of the

company are the excess of total admitted assets over total liabilities.

The same aggregate approach is true for the investment limitations, which are designed to impose diversification requirements for the entire general account, rather than any particular policyholder or line of business. For example, the 2% limitation on investing admitted assets in a single company applies to the general account as a whole, not assets derived from a particular policyholder or line of business.

New York insurance regulation aimed at protecting company solvency likewise does not distinguish among the different attributes of a company's policyholders. For example, most of the company's liability for its pension business is reflected in its annuity reserves. The annuity lines include policies issued to pension plans subject to ERISA, pension plans not covered by ERISA (such as governmental plans), and individual contracts not related to any overall plan. No distinction is made in computing liabilities between ERISA contracts and other contracts, and there is no segregation of assets in the general account for any of these different classes of policyholders.

2. *New York insurance law regulates insurance company dealings with the public.*

New York state insurance law also establishes strict standards governing insurance company dealings with the insuring public. No insurer may sell a policy unless the form of the policy is approved by the Superintendent of Insurance. N.Y. Ins. Law § 3201(b)(1) (McKinney Supp. 1993). The Superintendent may disapprove any group annuity contract if its provisions are "unjust, unfair or inequitable." *Id.* § 3201(c)(2) (McKinney 1985).

This emphasis on fairness is continued in the state's review of the operation of insurance contracts. No insurance company doing business in the state may

(1) make or permit any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof . . . .

N.Y. Ins. Law § 4224(a)(1) (McKinney 1985). This provision does not make the insurance company a fiduciary with respect to any particular holder of a general account contract. *Rochester Radiology Assocs., P.C. v. Aetna Life Ins. Co.,* 616 F. Supp. 985, 988 (W.D.N.Y. 1985). On the contrary, the provision emphasizes that an insurance company cannot under state law provide preferential treatment to any contractholder in the same class.

State law regulating the allocation of income and expenses within the general account further prohibits an insurance company from preferring any single contractholder or class of contractholders. Section 4239 requires the "equitable allocation of income and expenses as among lines of business," N.Y. Ins. Law § 4239 (McKinney 1985), and the Superintendent has issued regultaions approving "only such methods of allocation as will produce a suitable and *equitable* distribution of income and expenses . . . ." N.Y. Comp. Codes R. & Regs. tit. 11, § 92.4(a)(1) (emphasis added).[3] The Superintendent must also review and approve the implementation of methods for allocating investment results to pension contracts, including any amendments to a previously approved allocation method. *Id.* § 91.5(b).

[3] The requirement of fair allocation applies even though some insurance companies attribute certain assets to liabilities solely for income accounting purposes. This bookkeeping practice called "segmentation" does not result in the allocation of assets within the general account, and does not in any way result in the identification of specific general account assets with any specific obligations of the insurer. All general account assets, therefore, continue to support all of the company's general account obligations.

3. *New York insurance law also prescribes the rights of creditors and policyholders in the event of insurance company insolvency or impairment.*

The prohibition against discrimination extends to the liquidation of an insolvent insurer. While New York law establishes eight categories for the distribution of the assets of an insolvent insurer among the company's creditors, no subclasses within each class are permitted. N.Y. Ins. Law § 7435(a) (McKinney Supp. 1993). Under section 7435, claims under life insurance and annuity contracts are treated as a single class, and therefore discrimination with respect to distribution of assets among such contracts is specifically prohibited. *Id.* Moreover, the state does not permit preferential treatment among different categories of contractholders based on whether they are subject to, or exempt from, ERISA requirements.

II. CONGRESS DID NOT INTEND TO SUBJECT INSURANCE COMPANY GENERAL ACCOUNT ASSETS TO FEDERAL REGULATION, AND INDEED SPECIFICALLY RESERVED SUCH REGULATION TO STATE LAW.

An insurance company general account is required by state law to function in a manner designed to protect all policyholders from company insolvency or the prospect of discriminatory treatment. The court of appeals' decision would have the unwarranted and ultimately unworkable effect of superimposing on general accounts a conflicting system of federal regulation designed to hold plan fiduciaries to a standard of unswerving loyalty to the particular interests of the discrete population of the plan which the fiduciary serves.

This result cannot withstand scrutiny. As a matter of national policy, Congress has refrained from imposing federal regulation upon the business of insurance, and has instead reserved that function exclusively to the states. Nothing in ERISA evidences any congressional purpose to depart from that assignment of exclusive responsibility

by indirectly subjecting general account assets to federal regulation through ERISA's fiduciary standards. As a purely practical matter, insurance companies would in any event be unable to comply with the directly conflicting standards of state insurance law and ERISA.

A. The Second Circuit's Decision Contravenes Congressional Intent Manifested In ERISA's Insurance Savings Clause And The McCarran-Ferguson Act To Leave Regulation Of Insurance Solely To The States.

This Court has consistently recognized that federal law supersedes traditional areas of state authority, such as the regulation of insurance, only if this is "the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *accord FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990). This precept assures that the essential balance between federal and state regulation is not disturbed. *Jones v. Rath Packing Co.*, 430 U.S. at 525. Congress has explicitly recognized in both ERISA and the McCarran-Ferguson Act that the regulation of insurance should be left to the states.

Section 514(a) of ERISA provides that ERISA ". . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). Notwithstanding this broad preemption of state law to ensure a single, uniform system of federal regulation of employee benefit plans, Congress saved from preemption "any law of any State which regulates insurance. . . ." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). ERISA's Insurance Savings Clause applies to any state law that controls the terms of insurance contracts, *FMC Corp. v. Holliday*, 498 U.S. at 62 (state subrogation laws); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740-41 (1985) (state mandated benefit laws), as well as those aimed directly

at the insurance industry. *FMC Corp. v. Holliday*, 498 U.S. at 62; *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987).

ERISA's Insurance Savings Clause is a specific application of the congressional policy to leave insurance regulation to the states More broadly, in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, Congress provided that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation and taxation of such business." 15 U.S.C. § 1012(a). Laws governing the "business of insurance" as that term is applied under the McCarran-Ferguson Act include, among others, laws regulating the internal operations of insurance companies and laws regulating the substantive content of insurance contracts. *FMC Corp. v. Holliday*, 498 U.S. at 62.

There can be no doubt that the provisions of New York insurance law discussed in Section I.C, *supra*, fall within the protection of both ERISA's Insurance Savings Clause and the McCarran-Ferguson Act. These statutes are aimed directly at and apply exclusively to the insurance industry. They regulate the internal operations of insurance company general accounts, and establish standards for insurance companies' contracts with their customers. Congress has therefore expressly excepted these laws from interference by federal regulation.

Notwithstanding these statutes, the court of appeals concluded that whenever a company issues an annuity policy with a participation feature to an ERISA plan, at least some of the assets of the company's general account become plan assets subject to ERISA. This conclusion leads to one of two possible results, each equally untenable.

One possibility is that without any examination of the subject, Congress chose to replace the entirety of state regulation of the business of insurance with the trust law fiduciary principles embodied in ERISA. This possibility is plainly at odds with the express mandates of the in-

surance Savings Clause and the McCarran-Ferguson Act. Moreover, it is entirely unreasonable to infer that Congress intentionally but silently brought about such a sweeping change in the regulation of an entire industry, or did so through sheer inadvertence.

The other possibility is that the simultaneous regulation of insurance company general accounts under ERISA would not materially invade the established sphere of exclusive state regulation. However, as we show below, state regulations governing the management of the general account and the standards imposed by ERISA on plan fiduciaries establish a variety of incompatible rules of conduct, such that no company can faithfully comply with the essential elements of one system without violating explicit rules of the other system.

B. Carrying On The Business of Insurance Would Be Impossible If Insurance Companies Were Required To Comply With The Conflicting Standards of ERISA And State Insurance Law.

The essence of an insurance company's general account and the fundamental assumption of state insurance regulation is that assets in the general account are not segregated for the satisfaction of any particular contract claim. Instead, for purposes of regulating company solvency and company dealings with policyholders, state law requires that general account assets be maintained as the corpus from which every policyholder, employee, creditor, and owner may expect the company to perform its undertakings. All of the state rules governing the accounting for the company's assets and liabilities and the investment of general account assets flow from this premise. *See* Section I, *supra*.

ERISA, in contrast, requires that the management of plan assets be conducted by a fiduciary whose overriding duty is to conduct all of his functions "solely in the interest of the participants and beneficiaries" of the plan, ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), and for

the "exclusive purpose of" paying the benefits promised by the plan and defraying the plan's administrative expenses. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). This duty of undivided loyalty is the essential quality of an ERISA fiduciary and it is the foundation of ERISA's system of fiduciary regulation. *NLRB v. Amax Coal Co.*, 453 U.S. 332, 334 (1981). Inherent in this system is the principle that "plan assets" are held separately and are available only for the purpose of paying benefits and expenses of the plan to which the assets belong. This principle precludes, for example, a loan from a pension plan to a health plan with the same trustees and many, but not all of the same participants. *Cutaiar v. Marshall*, 590 F.2d 523, 529-30 (3d Cir. 1979).

The Second Circuit's decision assumes, without any examination, that general account assets that are in some fashion attributable to the participating features in an annuity contract may be segregated as assets of the particular plan which holds the contract, and that these segregated assets may be subjected to the full array of ERISA's fiduciary rules without affecting the treatment of the general account as a whole. The type of segregation implied by the Second Circuit cannot occur as a practical or as a legal matter.[4]

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[4] New York law already provides for the issuance of contracts supported by assets segregated in a separate account. N.Y. Ins. Law § 4240 (McKinney 1985 & Supp. 1993). These assets are not chargeable with the general liabilities of the insurance company, *id.* §§ 4240(a)(12) (McKinney 1985), 7435(b) (McKinney Supp. 1993), and are subject to a vastly different level of regulation under state law.

In 1973, when Congress was deliberating over pension reform legislation, life insurance company reserves for pension plans totaled $56.1 billion, of which only $9.6 billion—about 17%—was attributable to separate account contracts. Institute of Life Ins., *Life Insurance Fact Book 1974*, at 36. Congress was aware of the provisions of state law allowing insurance companies to offer investments in separate account contracts, and included a provision in ERISA providing that, with specified exceptions, the assets invested by a plan in a separate account contract constitute plan assets,

State law does not permit the segregation of assets within the general account for the exclusive satisfaction of the obligations of a particular contract. Thus, under the Second Circuit's rationale, a company that issues a participating annunity contract that encompasses plan assets must deal with those plan assets separate from its other general account assets and apply them to the exclusive purposes of the plan that holds the contract, in violation of state law, or it must maintain the integrity of the general account and violate ERISA's fiduciary standards. The only apparent alternative is to treat the plan as having an undivided interest in all general account assets, with all of the general account assets managed for the exclusive purpose of the particular plan. This approach, of course, leads to absurdity. A company could never pay dividends to its owners out of general account assets, since to do so would be to divert the plan's undivided interest in the assets to a purpose not "solely in the interest" of a plan's participants.

Expanding ERISA's application in this way does more than create an analytical conundrum. It would have a far reaching, disruptive effect on insurance companies. First and foremost, the risk management activities that are central to the business of insurance companies would be impossible if ERISA were to apply to general account assets. One of the essential features of such risk management is the pooling or spreading of risks by the insurance company. ERISA would require the dissection of the general account so that specific assets would be held for

ERISA § 401(b)(2)(B), 29 U.S.C. § 1101(b)(2)(B), and a provision that exempts the purchase of an interest in a separate account from ERISA's prohibited transaction rules. ERISA § 408(b)(8), 29 U.S.C. § 1108(b)(8). The different treatment provided for this relatively small proportion of plan investments in separate account contracts demonstrates the congressional view that general account contracts, representing a very large proportion of plan investments, do not involve plan assets, and therefore do not require a special exemption from ERISA's prohibited transaction rules.

specific customers. The risks covered under contracts issued to such customers could not be pooled with the risks of other insurance company customers. The assets required by ERISA to be segregated for these customers could not be used to fund payments for risks realized by other customers.

For example, an insurance company's mortality risk under any particular annuity policy (*i.e.*, the risk that the particular group of annuitants will live longer than predicted) is spread among the risks assumed under all of the company's annuity policies. Over a sufficiently broad population, the overall mortality risk assumed by the company is spread, and the company's assets will be sufficient to satisfy all of its annuity obligations. But if, consistent with the Second Circuit's holding, assets are segregated and held exclusively for the benefit of particular plans, the advantage of risk spreading is substantially diminished. Participants in a plan with above-average longevity may find that their separate assets are insufficient to pay promised benefits, and further find that they may not look to assets segregated for other ERISA plans with a contrary experience.

Application of ERISA would also create conflicts with the comprehensive state efforts to ensure the solvency of insurance companies. For example, N.Y. Ins. Law § 1405 (a) limits the investment of "admitted" assets in the general account to no more than 20% in equity holdings. In the case of a fiduciary who is simply separately managing assets, the fiduciary might conclude that given his plan's characteristics and the available investment alternatives, it is desirable to hold more than 20% of the plan's assets in equity securities. If so, he may invest to accomplish that goal.[5] In contrast, the insurance com-

[5] Indeed, from 1985 through 1987 (the most recent years for which figures are available) single-employer defined benefit plans with more than 100 participants have consistently invested more than 20% of assets in equities. U.S. Dep't of Labor, Pension and Welfare Benefits Admin., *Trends in Pensions 1992*, at 475 (1992).

pany that has issued policies deemed to include plan assets faces an inherent limitation under the state's rules limiting the aggregate amount of general account assets that may be invested in equities. If many of these plans would benefit from a greater proportion of investment in equity holdings, how should the insurance company allocate the limited supply of equity vehicles mandated by the state's concern for maintaining company solvency? And how can this be done consistent with the state's rule that all policyholders, including non-ERISA policyholders, be treated equitably?

If the Court were to determine that general account assets are subject to all of ERISA's provisions, similar complications would result from the application of ERISA's prohibited transaction rules, ERISA § 406, 29 U.S.C. § 1106, to general account operations. For example, section 406(b)(2) prohibits a fiduciary from engaging in a transaction involving plan assets where the fiduciary represents a party with interests adverse to the plan. 29 U.S.C. § 1106(b)(2). If an insurance company must allocate general account assets among its various plan policyholders, how may it do so without inevitably violating this rule? The very act of allocation from unsegregated general account assets to segregated plan assets inherently involves a transaction in which the company represents different interests—the plan's interest and the general account's interest.

These examples merely underscore the point that Congress, which sought to avoid these incongruities specifically through ERISA's Insurance Savings Clause and broadly through the McCarran-Ferguson Act, did not intend the massive dislocation in insurance company operations and state regulation that would inevitably flow from the Second Circuit's mistaken interpretation of ERISA.

III. PURSUANT TO LEGAL PRINCIPLES CONSISTENTLY APPLIED UNDER ERISA, INSURANCE COMPANY GENERAL ACCOUNT ASSETS ARE NOT PLAN ASSETS.

A. ERISA Contains No Generally Applicable Definition Of Plan Assets. The Department Of Labor's General Definition Demonstrates That General Account Assets Are Not Plan Assets.

The Second Circuit's error in subjecting insurance company general account assets to ERISA is also amply demonstrated by an examination of the provisions of ERISA and the legal principles applied thereunder. The fiduciary rules of ERISA primarily regulate the conduct of fiduciaries with discretionary authority over the investment of employee benefit plan assets. Identification of plan assets is, therefore, central to the application of ERISA's fiduciary rules. Despite this, ERISA does not specifically describe nor in every instance delineate what assets constitute plan assets. In particular, ERISA does not comprehensively address the effect of indirect relationships, such as whether the acquisition of stock or other instruments or contracts by a plan in some fashion results in the assets of the issuing company being treated as plan assets.

ERISA's only provisions addressing plan assets status in the indirect investment setting are the specific rules in section 401(b) for shares issued by registered investment companies and guaranteed benefit policies issued by insurance companies. 29 U.S.C. § 1101(b). ERISA section 401(b)(2) provides that, where a plan purchases a "guaranteed benefit policy" issued by an insurance company, as defined in section 401(b)(2)(B), the plan's assets shall be the policy but shall not include the insurance company's underlying assets held in the general account. In LICONY's view, that section is dispositive of this case.

The language of section 401(b)(2) specifies only the treatment of a contract that is a guaranteed benefit pol-

icy; it provides no guidance with regard to plan assets determinations in situations not involving guaranteed benefit policies. Employee benefit plans may acquire and hold a variety of instruments issued by insurance companies, such as stock issued by a stock life insurance company or a security interest in assets held by an insurance company. These instruments are clearly not guaranteed benefit policies, yet neither do they result in the underlying assets of the insurance company being treated as assets of the plan owning the instrument. Section 401(b)(2) should therefore be viewed as a safe harbor, rather than the exclusive means for determining the existence of plan assets.[6]

More broadly, the Department of Labor has recognized that ERISA contains no generally applicable statutory definition of plan assets. The Department moved to fill this void with a regulation setting forth a general definition which in terms does not specifially address insurance company general account assets. 29 C.F.R. § 2510.3-101 (1992). Given the Department's interpretation of section 401(b)(2), the lack of any specific mention of general account assets in the regulation is hardly surprising—in the Department's view, section 401(b)(2)

[6] Consistent with the language of ERISA section 401(b)(2) and its legislative history, the Department of Labor has interpreted ERISA section 401(b)(2) to mean that general account assets are not covered by ERISA. Because the Department of Labor is the agency charged with implementing and enforcing the fiduciary provisions of ERISA, its interpretations are entitled to the greatest possible deference by the Court. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

The court in *Mack Boring and Parts v. Meeker Sharkey Moffitt Actuarial Consultants*, 930 F.2d 267 (3d Cir. 1991), comprehensively analyzed both the language and the legislative history of ERISA section 401(b)(2), and both Petitioner and the American Council on Life Insurance as *amicus curiae* discuss these areas in great detail. LICONY agrees with the views expressed in those briefs. Consequently, we will not address the point.

completely disposes of the issue. 44 Fed. Reg. 50,363, 50,364 n.4 (August 28, 1979) ("[S]ection 401(b)(2) . . . mean[s] generally that assets held in an insurer's general account . . . are not plan assets . . . ."). If, however, the Court construes section 401(b)(2) differently, then the general definition of plan assets set forth in the regulation must still be considered to determine the status of general account assets. That general definition by itself provides complete insulation from plan assets treatment for insurance company general accounts.

B. Under The Generally Applicable Legal Principles Adopted By The Department Of Labor In Its Plan Asset Regulation, Insurance Company General Account Assets Are Not Plan Assets.

The Department of Labor's plan asset regulation begins with a broad principle:

> Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity.

29 C.F.R. § 2510.3-101(a)(2).[7]

The regulation then goes on to carve out a general exception for equity investments that are not publicly-offered securities. The purpose of this exception is to iden-

[7] The District Court extensively discussed Department of Labor Interpretive Bulletin 75-2 ("I.B. 75-2"), 29 C.F.R. § 2509.75-2 (1992), and other Department of Labor pronouncements regarding the plan asset determinaton. 722 F. Supp. at 1018-19. The Second Circuit briefly analyzed I.B. 75-2 and Department of Labor Advisory Opinions. 970 F.2d at 1144-45. The parties and *amici*, both below and in briefs regarding petitions for *certiorari*, have addressed the effect of the Department's plan asset regulation. *E.g.*, John Hancock Mutual Life Insurance Company Petition for a Writ of Certiorari at 14-15, and Appendix A-99; Brief of *Amicus Curiae* American Council of Life Insurance in Support of Petition for Writ of Certiorari at 7, 19-20; Brief of Plaintiff-Appellant Harris Trust and Savings Bank on Appeal before the Second Circuit at 11, 25, 26.

tify those situations in which a plan's investment in a supposedly separate entity is really nothing more than the retention of the managers of that entity to manage plan assets. If that is the effect of the investment, the regulation treats the assets of the entity in which the plan invests as plan assets. Preamble to Plan Asset Regulation, 51 Fed. Reg. 41,262 (November 13, 1986). To that end, the regulation states that plan assets treatment will result when: (1) the plan makes an equity (rather than a debt) investment in an entity; and (2) this investment is not covered by one of the further exceptions that protects against plan assets treatment, such as the exception for investments in an "operating company." 29 C.F.R. § 2510.3-101(3).

Applying this definition to general account contracts, it is apparent that such contracts do not give rise to plan assets treatment because the contracts are debt instruments rather than equity investments. But even if general account contracts are treated as equity investments, the issuing insurance company plainly falls within the regulation's exception for equity investments in an "operating company." Thus, whether such contracts are characterized as debt or equity under the regulation, the result is the same: the company's general account assets are not treated as plan assets.[8]

[8] We note that the Second Circuit erroneously concluded that the definition of plan assets provided in I.B. 75-2 would apply only in the case of the application of ERISA's prohibited transaction rules, and that a different standard would apply for determining the existence of plan assets for the purposes of applying ERISA's fiduciary duty rules. 970 F.2d at 1145. A logical reading of the statute eliminates this possibility. Fiduciary status regarding investment activities is determined specifically by reference to the existence of plan assets. ERISA § 3(21)(A), 29 U.S.C. § 1002 (21)(A). In the preamble to its plan assets regulation, the Department of Labor explained that the identification of plan assets is therefore the necessary first step in determining fiduciary status and the application of ERISA's fiduciary duty rules to such persons. 51 Fed. Reg. at 41,262. The Department continued:

1. *Because The Purchase Of A General Account Contract Establishes A Debtor/Creditor Relationship Under New York State Law, The Assets Of The General Account Of The Insurance Company Will Not Be Treated As Plan Assets.*

A necessary prerequisite for plan asset treatment under the Department's regulation is that the plan must make an investment in an "equity interest" in an entity. 29 C.F.R. § 2510.3-101(a)(2). The regulation defines "equity interest" as:

> any interest in an entity *other than an instrument that is treated as indebtedness under applicable local law* and which has no substantial equity features.

Id. § 2510.3-101(b)(1) (emphasis added). The rationale behind this provision is that, in the absence of an equity investment, the investing plan receives no interest in the underlying assets of the entity. This is the case, for example, with respect to a bank certificate of deposit. The plan's assets are the rights embodied in the debt instrument itself, not the debtor's underlying assets. 51 Fed. Reg. at 41,265-66.

The regulation looks to "applicable local law" to determine the character of the investment. 29 C.F.R. § 2510.3-101(b)(2). Under New York law, the purchase of an insurance contract the proceeds from which are held in the insurance company's general account establishes a debtor/creditor relationship. *Associates in Adolescent Psychiatry v. Home Life Ins. Co.*, 729 F. Supp. 1162, 1186 (N.D. Ill. 1989) (applying New York

> Moreover, the fiduciary responsibility provisions of ERISA include prohibited transaction provisions which restrict the manner in which fiduciaries may deal with the assets of a plan.

Id. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 n.8 (1985) (the fiduciary self-dealing prohibitions in ERISA section 406(b) establish a duty of loyalty for plan fiduciaries). The Second Circuit's conclusion in this regard should, therefore, be rejected.

insurance law), *aff'd on other grounds*, 941 F.2d 561 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1182 (1992); *Fidelity and Casualty Co. of New York v. Metropolitan Life Ins. Co.*, 42 Misc. 2d 616, 248 N.Y.S.2d 559, 565 (1963); *Clifford v. Metropolitan Life Ins. Co.*, 264 A.D. 168, 34 N.Y.S.2d 693, 695 (1942); *Bogardus v. New York Life Ins. Co.*, 4 N.E. 522 (1886); *People v. Security Life Ins. & Annuity Co.*, 78 N.Y. 114 (1879); G.J. Couch, *Couch on Insurance 2d* § 23.11 (rev. ed. 1984.)

In addition, the regulation requires that debt investment must have "no substantial equity features." Participation in general account experience, which is a key feature of most general account contracts used for pension plan funding, does not constitute a "substantial equity feature." *Associates in Adolescent Psychiatry*, 729 F. Supp. at 1186-88. There are two reasons why this is so. An equity investment is one that is dependent upon the discretion of management rather than being a fixed contractual commitment. In many cases, the participation element of general account contracts is discretionary, but the discretionary feature is insubstantial compared to the nondiscretionary features of the contract. *Id.* at 1188 (equity feature that is merely incidental to the primary fixed obligation does not cause plan asset treatment under the regulation). In other cases, the participation element of the contract represents a contractual commitment to credit interest in accordance with a fixed formula or procedure that does not permit management discretion. *Id.* at 1186. The insurer's contractual obligation to pay interest under this fixed formula or procedure demonstrates that the underlying obligation is a debt rather than an equity interest. *See e.g.*, Rev. Rul. 83-51, 1983-1 C.B. 48 (amounts paid pursuant to formula are ordinarily considered to be interest on debt where a definitely ascertainable sum is paid for the use of borrowed money).

A participating general account contract will, therefore, be treated under the regulation as indebtedness with no substantial equity features and the assets of the general account will not be plan assets subject to ERISA.

2. *Even If The Purchase Of A General Account Contract Were Treated As An Equity Investment, Such Purchase Would Constitute An Investment In An Operating Company And Therefore Would Not Cause Plan Asset Treatment.*

Even where the plan investment in an entity is treated as an "equity interest," that characterization will not subject the entity's assets to treatment as plan assets if the entity falls within the regulation's exception for an "operating company." 29 C.F.R. § 2510.3-101(a)(2)(i). An operating company is defined as:

> an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidaries, in the production or sale of a product or service other than the investment of capital.

Id. § 2510.3-101(c). This exception was included in the original proposed regulation, 44 Fed. Reg. 50,363, 50,366-67 (August 28, 1979), and was a constant during the seven year regulatory process leading to the issuance of the final plan assets regulation. The Department's intention in including this exception was to distinguish vehicles created merely for the indirect provision of investment management services from those enterprises engaged in an active trade or business. 51 Fed. Reg. at 41,270. As explained in connection with a reproposed version of the operating company exception:

> Where an enterprise is not designed to function as the investment intermediary, an investment in the enterprise should not be deemed to be the equivalent of a delegation of investment management authority. This would be the case, for example, with an investment in an "operating" company.

45 Fed. Reg. 38,084, 38,085 (June 6, 1980). Indeed, the final regulation recognizes that some entities may nevertheless possess some investment management characteristics and still qualify as operating companies. 51 Fed. Reg. at 41,271.[9]

This Court has repeatedly recognized that the principle business of insurance companies is the spreading and management of various types of risk. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127-28 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). In undertaking this business, insurance companies clearly function as operating companies within the contemplation of the regulation.

In order to provide these risk management services and products, the insurance company engages in a broad variety of business-related activities, including hiring employees; paying taxes; owning, leasing and managing office buildings; purchasing furniture and office equipment; providing administrative services; and paying dividends to owners. All of these activities are carried on through the

[9] *See* 29 C.F.R. § 2510.3-101(d) (venture capital funds that qualify for treatment as "venture capital operating companies"); *id.* § 2510.3-101(e) (real estate investment vehicles that qualify for treatment as "real estate operating companies"). The entities covered by these special operating company definitions derive their operating company status solely from the types of investments they make and the management activities undertaken as the result of those investments. Thus, for example, a venture capital operating company must invest a specified portion of its assets in subsidiary portfolio companies as to which it possesses management rights. *Id.* § 2510.3-101(d)(3). Similarly, a real estate operating company must invest a specified percentage of its assets in real estate related investments that are actively managed. *Id.* § 2510.3-101(e)(1). Except for the fact of these regulatory exceptions, these entities in most respects are indistinguishable from insurance company separate accounts and the other types of pooled investment vehicles that the Department has concluded will in all cases hold plan assets. *See id.* § 2510.3-101(h)(1).

general account, which is the operating account of the insurance company.[10]

Insurance companies therefore are engaged in the operation of a business, and as such qualify as operating companies under the Plan Asset regulation. In doing so, it is clear that insurance companies do not exist solely as a surrogate for the delegation of plan investment management authority. Indeed, it would be incomprehensible to exclude insurance companies from operating company status when the Department has recognized this status in entities with far fewer operating company characteristics.

Accordingly, to the extent that a plan purchasing a general account contract is deemed to have made an equity investment in an insurance company, the insurance company must be viewed as an operating company, and the assets held in its general account insulated from plan asset treatment under the terms of the Department's regulation.

[10] Respondent has criticized petitioner for holding assets such as its Home Office building in the general account, and has intimated that such holdings could involve prohibited transactions under ERISA section 406, 29 U.S.C. § 1106. *See* John Hancock Mutual Life Insurance Company Petition for Certiorari at A-31-32. Aside from demonstrating the anomalous consequences of applying ERISA's fiduciary duty rules to the insurance company general account, Respondent's position demonstrates a complete lack of understanding of the function of the general account. The general account is not a pooled investment fund held for the benefit of all policyholders. Rather, it is comprised of all assets held by the insurance company in the operation of its general business.

CONCLUSION

The decision of the court of appeals, insofar as it reversed the judgment of the district court dismissing the action, should be reversed.

Respectfully submitted,

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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, as Trustee of the Sperry Master Retirement Trust No. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF MASSACHUSETTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Attorneys General of the State of New York and the Commonwealth of Massachusetts respectfully submit this brief on behalf of the Superintendent of Insurance of the State of New York and the Commissioner of the Division of Insurance of the Commonwealth of Massachusetts as *amici curiae* in support of the Brief for Petitioner, the John Hancock Mutual Life Insurance Company ("John Hancock").

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Superintendent of Insurance of the State of New York (the "Superintendent"), as head of the Department of Insurance (the "Department"), regulates the business of insurance in New York. The Superintendent is responsible for monitoring and regulating insurers that do business in New York, such as petitioner John Hancock. The Superintendent is required by law both to establish the nature and characteristics of the insurance products offered in New York, and to regulate the manner in which they are sold. In doing so, the Superintendent supervises the financial affairs of each of the insurers subject to his jurisdiction.[1] The group annuity contract that is the subject of this lawsuit ("GAC 50") was issued in New York and was reviewed and approved by the Department.

As of December 31, 1991, there were 87 life insurance companies domiciled in New York and another 60 licensed to do business in the State. In 1991, these insurers received premiums of more than $30 billion for all insurance products; they received premiums in New York totaling almost $19 billion for annuities alone, taking into account both individual and group annuities. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book* 74 (1992). Nationwide, as of December 1991, life insurance companies under contract with retirement plans held approximately $746 billion in reserves. Of that $746 billion, $565 billion was held under general account contracts. *Id.* at 58. $394 billion was held under group annuity contracts like GAC 50.

The Superintendent's mandate is the protection of the insuring public through the enforcement of New York's comprehensive

1. Similarly, the Commissioner of the Division of Insurance of the Commonwealth of Massachusetts ("the Commissioner") is responsible for regulating insurance offered for sale to the public in Massachusetts.

legislation governing the business of insurance in New York. This legislation both ensures the financial stability of insurers doing business in New York and protects the public by strictly prohibiting unfair discrimination or inequitable treatment of policyholders and contractholders.[2] Given the significance of insurance transactions to the financial stability of the national and the New York economies, it is critically important for the Superintendent to regulate insurers' products and to demand proper accounting of insurers' obligations to ensure that they can make good on their promises. With a substantial proportion of the insurance industry's general account assets attributable to general account contracts with retirement funds, the present controversy poses problems of fundamental concern.

The Second Circuit's decision applies the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 (1988)

2. In Massachusetts, similarly, among the Commissioner's most important functions is the determination of whether insurers are sufficiently stable financially to continue to issue and service insurance contracts. Comprehensive regulations govern the relationship insurers' assets must bear to their liabilities as well as the composition of insurers' capital. There are laws governing, for example, the computation of reserves, Mass. Gen. Laws Ann. ch. 175, §§ 9, 9A (West 1987), the determination and valuation of an insurer's assets and liabilities, *id.* at ch. 175, §11, and the manner in which an insurer may publish its assets and liabilities, *id.* at ch. 175, § 18. Massachusetts' insurance laws also: (1) set forth minimum standards for the commencement of business, including the examination by the Commissioner of the insurer's books and records, *id.* at ch. 175, § 32; (2) require the filing and establish the standards for the preparation of a uniform annual report, *id.* at ch. 175, §§ 25, 27; and (3) provide for periodic examinations by the Commissioner, *id.* at ch. 175, § 4. The quality and quantity of permissible investments is also strictly regulated. *Id.* at ch. 175, §§ 63-64 (investment limitations); *id.* at ch. 175, § 65 (mortgage loans); *id.* at ch. 175, § 66-66E (investments by domestic life companies).

("ERISA"), to an insurer's management and administration of its own general corporate assets. The Superintendent has a significant interest in reversing this conclusion for four reasons. First, the Second Circuit's decision will confound Congress's intention—and the common understanding of the insurance industry, the New York Department of Insurance, and the United States Department of Labor—that the regulation of insurance be left to the States. Second, application of the decision will severely impair the administration of the insurance laws by State insurance regulators. Third, the decision will interfere with the nondiscriminatory and equitable treatment of policyholders and contractholders required by State law. And fourth, the decision will interfere with the State's ability to ensure the financial stability of insurance companies operating in the State.

Taken together, these effects will undermine the heretofore successful effort of the State of New York to establish and implement a regulatory framework that assures a rational and stable insurance industry and fair and equitable treatment of all policyholders and contractholders.

SUMMARY OF ARGUMENT

Premiums paid to an insurance company under a group annuity contract such as GAC 50 become part of the insurer's general corporate assets, commonly known as the insurer's general account, unless they are allocated to a separate account.[3] An insurance company uses its general account to pay its operating expenses (*e.g.*, salaries, rent and taxes), obligations to general account

3. Under New York law, only fixed benefit payments may be made from an insurer's general account. New York law permits the payment of variable benefits, but only from a separate account. N.Y. Ins. Law § 4240 (McKinney 1985 & Supp. 1993); N.Y. Comp. Codes R. & Regs. tit. 11, § 50.1 *et seq.* (1993).

contractholders, obligations to creditors, and dividends to contract and policyholders. General account assets are not segregated for the benefit of any particular class of contractholders. Thus, all contractholders share equally in the security afforded by the undifferentiated general account. In monitoring the solvency of an insurance company, the Superintendent and the Department do not match specific liabilities with specific assets, but compare total liabilities with the general account's aggregate assets (though specific business lines are monitored on an asset-liability match basis).

For the exclusive benefit of one class of general contractholders—ERISA plans—and to the detriment of every other class, the Second Circuit's decision would require insurers to manage general account assets attributable to ERISA plan contractholders "solely in the interest of the [plan's] participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988). The decision could have the practical effect of requiring every insurer—somehow—to segregate from its currently undifferentiated general account those assets that are now to be subject to fiduciary treatment.

Such a requirement would impose extraordinary burdens upon both the industry and the Department and would raise unanswerable questions of equity and fairness. Just as significantly, it would be fundamentally inconsistent with the nature of insurance company general accounts and with their regulation under State insurance laws. The decision below intrudes into, and throws into disarray, the management and regulatory functions reserved to the States:

- By compelling insurers to give their own general account funds (that are deemed to be ERISA "plan assets" notwithstanding the ERISA plan's election to

buy a group annuity contract) preferential treatment in favor of ERISA contractholders, the Second Circuit would not only permit, but *require*, inequitable or unfair discrimination against other contractholders in violation of State law.

- Besides being an unfair preference in the eyes of State law, such special treatment of ERISA contractholders would undermine New York's comprehensive regulatory program governing the solvency of insurers. For sound financial reasons, that program prohibits "subclasses" for purposes of the distribution of assets of impaired or insolvent insurers in a liquidation or rehabilitation proceeding.

- Because an insurer's general account is presently undifferentiated, with no allocation of assets for specific policyholders and contractholders, there is no basis for determining which individual general account assets are to become "plan assets," much less the plan assets of a particular contractholder. Because different assets in the general account have different investment characteristics—for example, bonds, real estate, common stock, etc.—any scheme for the allocation of component assets of the general account to individual ERISA contractholders would necessarily be unimaginably cumbersome and inherently inequitable. Significantly, it is the nature of insurance and it is the fundamental economic objective of the insurance industry to *spread* risks, as the undifferentiated general account does. To require segregation of assets into hundreds or thousands of smaller, separately managed packages,

one for each ERISA contractholder, is exactly what the general account insurance contract is *not* designed to do.

- Because the Second Circuit would apparently accord "plan assets" a status separate and apart from other general account assets, it is now unclear whether these funds would be "admitted assets" that could be used to offset an insurer's general account liabilities, or indeed whether they would be assets of the insurer at all for statutory insurance accounting and solvency monitoring purposes. The decision thus would interfere with the Superintendent's ability to monitor and ensure the solvency of insurance companies, the insurer's ability to make investment and dividend decisions, and the public's ability to rely upon the accuracy of available financial information in making insurance-related decisions and evaluations.

These are not incidental intrusions on the regulation and business of insurance. They are profound changes that will affect insurers and insurance regulators nationwide, and that will confound the intent of Congress that the regulation of insurance be the exclusive province of the States.

This outcome is not the result of any clear, statutory directive; indeed ERISA and State insurance regulation have coexisted in relative peace since 1974. Rather, this problem arises from an interpretation of ERISA that ignores every explicit statutory attempt to harmonize State and federal law, and that misreads an explicit

statutory provision that disclaims any intention to regulate insurers' general account practices.[4]

In short, the decision below would appear to mandate a thorough restructuring of the insurance industry under a federal law that was never intended to interfere with the States' traditional responsibility to regulate that industry. It should be reversed.

ARGUMENT

THE SECOND CIRCUIT'S DECISION SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH CONGRESS'S ALLOCATION OF THE REGULATION OF THE BUSINESS OF INSURANCE TO THE STATES

A. Congress Allocated The Responsibility For Regulating The Business Of Insurance To The States

The regulation of insurance is an area of traditional State regulation that Congress did not intend to preempt. *See FMC Corp. v. Holliday*, 498 U.S. 52, 62 (1990). Congress made this intention clear in the McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1988)), which states:

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation and taxation of such business. . . . No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance. . . .

4. ERISA excepts from fiduciary status an insurer's assets in connection with "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." ERISA § 401(b)(2)(B), 29 U.S.C. § 1101(b)(2)(B) (1988).

15 U.S.C § 1012(a), (b) (1988). Because ERISA does not "specifically relate[] to the business of insurance," it cannot "invalidate, impair, or supersede" State law under McCarran-Ferguson. *Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978) (holding that ERISA does not preempt State law mandating benefits to plan participants because "[u]nder [the McCarran-Ferguson Act], the only congressional enactment which may 'invalidate, impair, or supersede' any state insurance law is an act which 'specifically relates to the business of insurance'") (citations omitted).[5]

Indeed, ERISA itself contains two provisions that preserve to the States the regulation of the business of insurance. First, section 514(d) states: "Nothing in [ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . ." ERISA § 514(d), 29 U.S.C. § 1144(d) (1988). Under this provision, ERISA cannot be construed to regulate insurance, as this would violate the McCarran-Ferguson Act, which specifically reserves that power to the States.

Second, ERISA exempts State insurance law from federal regulation in Section 514(b)(2)(A): "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988) (the "saving clause").

5. *But see, e.g., Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

This Court examined the effect of the saving clause in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), when it held that ERISA did not preempt a Massachusetts State regulation mandating benefits for certain policyholders. The Court found that the State law "regulated insurance" within the meaning of the saving clause and thus could not be preempted by ERISA.

In deciding *Metropolitan Life*, the Court first noted that it "must presume that Congress did not intend to pre-empt areas of traditional state regulation." *Id.* at 740. "The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope." *Id.* at 741. Once the Court determined that the law in question regulated insurance within the meaning of the saving clause, there could be no preemption. "If a state law 'regulates insurance,' . . . it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause . . . ." *Id.* at 746.

The Court also cited the McCarran-Ferguson Act to support its decision: "The ERISA saving clause, with its similarly worded protection of 'any law of any state which regulates insurance,' appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States." *Id.* at 744 n.21.

B. State Insurance Law Applies Even When State Law And ERISA Conflict

ERISA would "save" State insurance law even if there were a direct conflict between State law and a provision of ERISA. The plain language of the saving clause itself supports this conclusion: "*Nothing in this subchapter*"—whether or not it is in direct conflict with State law—"shall be construed to exempt or relieve any person from *any law of any State which regulates insurance*, banking, or

securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (1988) (emphasis added). In *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), for example, a self-funded ERISA benefit plan contained a subrogation clause under which a plan member agreed to reimburse the plan for benefits paid if the member were to recover on a claim in a liability action against a third party. Pennsylvania law, however, expressly precluded subrogation by the plan, thus creating a direct conflict between the plan and State law. The Court stated that when ERISA and State law conflict, "[u]nless the statute is excluded from the reach of the saving clause by virtue of the deemer clause . . . it is not pre-empted." *Id.* at 61.[6] The Court recognized "Congress' presumed desire to reserve to the States the regulation of the 'business of insurance.'" *Id.* at 63.[7]

The Tenth Circuit has recently affirmed the power of the saving clause to displace ERISA in favor of State law in the event of a conflict. In *Winchester v. Prudential Life Ins. Co.*, 975 F.2d

6. Under the deemer clause, ERISA § 514(b)(2)(B), 29 U.S.C. §1144(b)(2)(B) (1988), "an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts." *FMC Corp.*, 498 U.S. at 58. The clause prevents regulation of self-insured plans by States purporting to regulate insurance. *Id.* at 61. The deemer clause has no bearing on this case.

7. Nothing in this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 4[illegible] (1987), suggests a contrary result. There the Court merely reaffirmed that the federal remedy provided by ERISA was the exclusive remedy for enforcing rights guaranteed under the statute. The Court held that any State-law claim seeking payment of benefits was preempted because the applicable State common law did not "regulate insurance" and thus was not protected from preemption by the saving clause. *Id.* at 50-51. Unlike the State law in *Pilot Life*, the New York laws at issue here, discussed below, "regulate insurance" and are thus protected by the saving clause.

1479 (10th Cir. 1992), the court recognized a potential conflict between Utah State decisional law and the terms of an ERISA benefit plan. The plan participant, a plant operator at an electrical power plant, suffered heart failure following a fire-fighting exercise. The plan's benefits included term life insurance and accidental death benefits. The insurance policy stated that accidental death benefits were conditioned on the employee's sustaining "an accidental bodily injury." Utah decisional law did not recognize heart failure after planned exertion as an "accidental bodily injury."

Relying on this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the court concluded "that the saving clause does save the Utah decisions at issue from preemption." *Winchester*, 975 F.2d at 1485. Though the terms of the ERISA plan's insurance policy arguably provided coverage for the accident, State law, not ERISA, governed the resolution of the dispute. *Id.*

To the extent that there is tension between ERISA and State law—and we submit that there is none because ERISA's guaranteed benefit policy exception applies—the controversy before this Court must likewise be resolved in favor of State law. Once within the saving clause, State statutes cannot be preempted, even when there is a conflict: "If a state law 'regulates insurance,' . . . it is not preempted." *Metropolitan Life*, 471 U.S. at 746.[8] Congress has demonstrated its clear intent to preserve for the States the power to regulate insurance: first in the McCarran-Ferguson Act, and twice more in ERISA Sections 514(d) and 514(b)(2)(A). The Second Circuit therefore erred in failing to effectuate Congressional intent to defer to the States in the regulation of insurance.

8. To suggest otherwise—that ERISA preempts State law when there is a conflict—would imply that the saving clause has meaning only when State law and ERISA are consistent. If that was Congress's intent, however, it could have made that clear—but did not.

C. Imposition Of ERISA's Fiduciary Responsibility Provisions On Insurers Would Create Irreconcilable Duties For Insurers And Profoundly Disrupt The State Regulation Of Insurance

The Second Circuit's decision would impose on insurers a duty to manage "plan assets" in their general account "solely in the interest of the [plan's] participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988). This imposition of ERISA's fiduciary standard would create irreconcilable duties for insurers in light of state insurance law requirements that all policyholders be treated in a fair and equitable manner, and would disrupt New York's regulation of general account assets and contracts.[9] The Second Circuit's decision should be reversed.

1. The Second Circuit's Decision Creates a Conflict Between State Law And ERISA

It is not the objective of *amici* to advocate constructions of a federal statute. Nonetheless, the Second Circuit's extension of ERISA is premised upon an attenuated construction of statutory language that does not, by its terms, appear to compel the kind of sweeping systemic upheaval that State regulators now face. Besides refusing to preempt State insurance law generally, ERISA in fact explicitly excepts from fiduciary status "guaranteed benefit policies." A guaranteed benefit policy is an "insurance policy or contract to the extent that such policy or contract provides for

9. Massachusetts' comprehensive regulatory scheme for insurance companies would likewise be frustrated by the imposition of ERISA's fiduciary standard to general account contracts. *See* note 2, *supra*.

benefits the amount of which is guaranteed by the insurer." ERISA § 401(b)(2)(B), 29 U.S.C. § 1101(b)(2)(B) (1988).

Now, almost twenty years after the initial passage of ERISA, the Second Circuit has suddenly isolated the guaranteed benefit policy provision without regard for business and regulatory realities. Relying on a nuance, the Second Circuit would bifurcate group annuity contracts and, inadvertently but inevitably, undermine the State regulatory scheme.[10]

10. While general account contracts like GAC 50 guarantee a benefit to plan participants regardless of an insurer's investment performance, they also participate in the favorable investment experience of the insurer's general account by receiving an allocation of net investment income. Consequently, the book value of the premiums paid to the insurer, combined with any income or dividends allocated to the contract, less the amount of any benefits previous paid, may exceed the contractual cost of the guaranteed benefits. The term "free funds" is used colloquially to refer to this book value excess.

The opinion below in effect bifurcates a single group annuity contract into two separate contracts, one for the "book value" of the benefits guaranteed under the contract, the other for the "free funds." It should be emphasized that there is no state regulatory basis for creating, let alone precisely defining, such a thing as "free funds."

Perhaps more important for present purposes, there is in place no regulatory system at all that would permit, let alone effectively implement, a financial bifurcation of individual contracts into component parts to be treated differently. Although the Second Circuit takes pains to limit its holding to "free funds," as if that were a helpful distinction, the Superintendent has no current comprehension of how to implement such a scheme in real life.

If the "free funds" are viewed as the favorable net investment experience of the insurer, they are not unlike the divisible surplus that can accrue on participating life insurance policies and annuity contracts subject to Section 4231 of the New York Insurance Law. Participating cash value

(continued...)

ERISA itself does not call for any such bifurcated scheme. The Second Circuit relied upon a fragment of equivocal legislative history to support its line of thought, along with inapposite advisory opinions by the Department of Labor ("DOL"). Although it has enforced the fiduciary responsibility provisions of ERISA for almost twenty years, DOL appears never to have asserted jurisdiction over an insurer's general account, and has promulgated no regulations of which New York is aware to govern the conduct of insurers in New York or any other State. Moreover, DOL has unambiguously stated that general account assets are not plan assets under ERISA. *See* Interpretive Bulletin 75-2, 29 C.F.R. § 2509.75-2 (1991). Evidently acknowledging the intention of Congress as expressed in both the McCarran-Ferguson Act and the saving clause of ERISA itself, DOL has left the business of regulating the insurance industry to the States.

Similarly, the insurance industry itself has never understood ERISA to have the profound impact on the regulation of insurance that the Second Circuit's decision would impose. The industry has never undertaken to develop insurance products that would accommodate the bifurcated obligations that the Second Circuit is imposing through its reading of ERISA.

Thus, the Second Circuit's conclusion that Congress intended ERISA to encompass insurers' own management of premiums paid pursuant to arms-length contracts between insurers on the one hand

10.(...continued)

life insurance has been used as a funding vehicle for retirement plans, especially small plans, for decades. The Superintendent is concerned that the reasoning of the Second Circuit would also apply to participating cash value life insurance policies, bifurcating the guaranteed cash value of the policy and the dividends that may have accrued, and requiring that the insurer's divisible surplus be subject to fiduciary treatment under ERISA.

and ERISA plan fiduciaries on the other takes ERISA into territory that Congress has never in fact traveled. Indeed, it was to avoid that terrain—to leave to the States the complex and intricate job of assuring a functional insurance industry—that Congress explicitly excepted guaranteed benefit policies from ERISA. Congress chose to impose substantial responsibilities on *plan trustees* and *advisors* to select the right financial products from the extensive menu offered by the insurance and financial industries.

Furthermore, in stretching ERISA to regulate general account assets, the Second Circuit did not consider the State's exclusive responsibilities for insurance regulation. *See* Opinion of the Second Circuit, *passim*. Indeed, it is the magnitude of the adverse implications for State regulation arising from the Second Circuit's decision—which the opinion below never discusses—that most powerfully demonstrates the Second Circuit's error.

2. The Second Circuit's Decision Undermines Basic Insurance And Financial Principles And Conflicts With State Statutory Schemes For Monitoring The Solvency Of Insurers

The underlying purpose of insurance is the provision of contractually specified benefits that may come due at some future date. Assuring the ability of an insurer to meet these obligations is a central goal of New York's and Massachusetts' systems of insurance regulation. Requiring an insurer to act solely in the interest of a favored sub-group of participants and beneficiaries, however, would frustrate the regulators' ability to monitor an insurer's solvency and financial well-being under the statutory accounting practices mandated by State law.

The fundamental traditional financial benchmark for ascertaining an insurer's financial condition is a comparison of the insurer's total admitted assets (as defined in Section 1301 of the

Insurance Law of the State of New York) with the total amount of its other liabilities.[11] Admitted assets are grouped for statutory financial reporting purposes by category (*i.e.*, common stocks, preferred stocks, bonds, real estate, mortgage loans, etc.). Section 1301(a) of the Insurance Law requires that an admitted asset be owned by the insurer. General account funds are *owned by insurers* regardless of their source. This general, undifferentiated pool of assets, owned by the insurer, is the heart of its financial stability.

The Second Circuit's decision undermines this scheme by redefining funds that it deems under ERISA to be subject to special fiduciary treatment. As noted above, this special treatment would affect a substantial portion of the assets in general accounts. By the Second Circuit's view, these "free funds" are no longer assets beneficially owned by the insurer as the Department has previously understood and applied that term. If an insurer is regarded as an administrator of funds that it must manage exclusively for the benefit of a plan (because they are plan assets), those funds should not be viewed as assets of the insurer available to be offset against its liabilities. An inability to treat those funds as admitted assets could create an imbalance in an insurer's admitted assets on the one hand and its liabilities on the other, potentially creating the basis for a determination that it is insolvent. N.Y. Ins. Law § 1309(a) (McKinney 1985).[12] Under New York statutory provisions, the

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11. Insurers licensed in New York are required to maintain a minimum "surplus to policyholders," as set forth in the Insurance Law, based upon the lines of business that they write. Section 107(a)(42) defines the surplus to policyholders as "the excess of total admitted assets over the liabilities of an insurer."

12. Obligations to pay out proceeds pursuant to the terms of group annuity contracts are carried currently as general company liabilities, again without differentiation or regard to beneficiary. Thus, although (continued...)

Superintendent would then be authorized to suspend or revoke the license of a foreign or alien insurer or to place a domestic insurer in rehabilitation or liquidation. N.Y. Ins. Law §§ 1309(b), 7402(a) & 7404 (McKinney 1985).[13]

In essence, the Second Circuit's decision can be construed to create a new category of asset (if it is an asset of the insurer at all) not specifically authorized by State law. On the one hand, funds subject to ERISA fiduciary treatment are not necessarily general account assets against which the general liabilities of the insurer can be offset. On the other, it is clear that they are not separate account

12.(...continued)
reallocation of both assets attributable to ERISA plan customers (from general account assets) and corresponding liabilities for monies eventually owing to those customers does not create an imbalance *for those customers*, it does completely transform *the insurers'* financial situation. *First*, under the Second Circuit's decision, funds attributable to ERISA plans would simply be unavailable to the owned-capital base of the insurer, upon which its ability to take on and pool risks depends. *Second*, one must question whether fiduciary funds may be used in any way to conduct the very business of insurance, *i.e.*, the devotion of capital to cover risk for a projected profit.

13. Likewise, under the Risk-Based Capital Model Act of the National Association of Insurance Commissioners ("NAIC"), with which all States will eventually comply in order to obtain or maintain their accreditation from the NAIC, every life insurer will have to file with the Department of Insurance in its domiciliary state a risk-based capital report. The report solicits information about four different kinds of risks undertaken by every insurer—asset risks, insurance risks, business risks, and all other risks—to evaluate the sufficiency of each insurer's capitalization. Because the calculation of asset risks is based on those assets classified as admitted assets for financial reporting purposes, a determination that plan assets in an insurer's general account are not "admitted assets" will complicate and confuse any analysis of an insurer's financial health.

assets immune to such offsetting.[14] They are, apparently, a judicially created hybrid, a general account asset that may not be used to satisfy claims on the general account. The creation of this hybrid "asset," if accepted, would have powerful adverse effects on the ability of insurers to conduct business and on State regulators to monitor that business. If a large portion of the insurers' undifferentiated general account—i.e. its capital base—were reallocated to a series of specially-managed fiduciary accounts, the general account would be deprived of a huge pool of assets. Assessing the financial stability of thousands of participants in that network, under as yet indeterminable legal and financial standards, is a daunting task. Moreover, one must consider whether the insurance industry as we know it can remain viable when its capital base is reallocated, legally or otherwise, among various accounts. If insurers are no longer able to manage a substantial portion of their general account for the benefit of all general account contractholders, and cannot utilize that now-segregated capital to take on risks (because they are deemed to be fiduciaries to risk-averse pensioners), the business of insurance will (at a minimum) have to be reconstructed.

14. Separate account assets, while assets of the insurer, may not be used to satisfy claims on the insurer's general account. Section 4240 of the Insurance Law, governing separate accounts, provides the exclusive means for insulating assets from general account liabilities. Under a separate account arrangement, the annuity contractholder assumes the insurer's investment risks, and the assets are segregated from the liabilities of the insurer's general account and other separate accounts maintained by the insurer for other contractholders. Such separate account assets are specifically excluded from the estate of a domestic life insurer in applying the scheme for the distribution of claims of Section 7435. To the extent that the Second Circuit's decision attempts to insulate assets from general account liabilities through its imposition of fiduciary treatment on certain assets in the general account, it does so inconsistently with Section 4240.

From the point of view of the purchaser of an insurance policy, be it a life insurance policy or otherwise, access to these now-segregated accounts to pay claims cannot be considered a given. Although the decision below fails to elaborate, it would appear that its imposition of ERISA duties on insurers is premised upon the notion that funds acquired by insurers by selling group annuity contracts to ERISA plans continue to be beneficially owned by those plans, and must be used solely in the interests of those plans. To the extent that this premise precludes access to those funds to pay insurance claims of general account policyholders, or involves even a new preference in paying out an insolvent insurer's assets first for the claims of ERISA participants before the claims of other general account policyholders, one must expect a dramatic loss of market confidence in insurers' abilities to provide security.

It is the Superintendent's view that, fundamentally, purchasers of insurance company group annuity contracts are purchasing insurance products that guarantee the payment of retirement benefits to plan participants and permit participation in the positive experience of the insurer's general account. They are not, and have never been, purchasing an investment advisory service subject to federal regulation. To the extent that the decision below requires reallocation of the capital base of insurers, it is antithetical to the very nature of insurance and, paradoxically, will deprive ERISA plans of the protection they thought they had purchased as part of the insurer's general account.

3. The Second Circuit's Decision Would Massively Complicate An Insurer's Ability To Make Investments

The primary purpose of the investment provisions of New York's Insurance Law is to restrict the types, quality, and amounts of assets acquired by insurers to ensure that insurance companies will be financially solvent and able to pay their policyholders' claims. 1 Wolcott B. Dunham, Jr., *New York Insurance Law* § 8.01[1] (1992). Section 1405 of the Insurance Law sets forth the permissible investment categories, and expresses investment limitations as a percentage of admitted assets. *Id.* § 8.04[1]. For example, Section 1405(a)(2) permits investments in the obligations and preferred shares of American institutions, "provided, however, that . . . the aggregate amount of investments in preferred shares of such institution made under this section *shall not exceed two percent of the insurer's admitted assets.*" (emphasis added).

Because, after the Second Circuit's decision, it is no longer clear whether "plan assets" constitute "admitted assets," affirmance of the decision below would throw New York's entire system for regulating permissible investments into confusion. If plan assets are not admitted assets against which the general liability of an insurer can be offset, then insurance companies relying on Section 1405 limitations may have overinvested in otherwise permissible categories of investments, perhaps to the detriment of all of their general account policyholders. Divestment, reinvestment and/or a basic rewrite of the State regulatory system could be required.[15]

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15. At the very least, any allocations of existing investment assets between ERISA contractholders and non-ERISA contractholders may require insurers, as ERISA fiduciaries, to allocate better performing assets to ERISA contractholders, with poorer performing assets allocated to non-ERISA contractholders. Furthermore, it is unclear how assets are to be (continued...)

4. **The Second Circuit's Decision Requires Insurers, In Violation Of State Law, To Discriminate Against The Holders Of Contracts Not Subject To ERISA**

Generally, insurance is the equitable spreading of risk among a large number of policyholders or contractholders backed by the pooled assets of the insurer's general account. Those pooled assets are available to satisfy claims made under each of the policies or contracts. New York pursues its goal of equitable treatment of policyholders through a number of statutory provisions;[16] the Second Circuit's decision would frustrate the effectiveness of those provisions.

Section 4224(a)(1) of the Insurance Law, for example, states:

> (a) No life insurance company doing business in this state and no savings and insurance bank shall:
>
> (1) *make or permit any unfair discrimination between individuals of the same class* and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the

15.(...continued)
allocated to each ERISA contractholder consistent with the fiduciary duties imposed upon the insurer by ERISA.

16. *See, e.g.*, *Health Ins. Ass'n of Am. v. Corcoran*, 551 N.Y.S.2d 615, 618 (3d Dep't), *aff'd*, 565 N.E.2d 1264 (1990) ("'The function of [the Department of Insurance] is to ensure equity both to policyholder and company, not only in rates but in the extremely important realm of giving the public proper coverage in return for premium payments.'") (quoting *Public Serv. Mut. Ins. Co. v. Levy*, 387 N.Y.S.2d 962, 964 (Sup. Ct. N.Y. Co. 1976), *aff'd*, 395 N.Y.S.2d 1 (1st Dep't 1977).

> dividends or other benefits payable thereon, *or in any of the terms and conditions thereof* . . . .

N.Y. Ins. Law § 4224(a)(1) (McKinney 1985) (emphasis added). Similarly, Article 74 of the Insurance Law, which sets forth procedures for the rehabilitation and liquidation of domestic insurers, establishes priorities for the distribution of the general account assets of an insurer's estate among claimants, including annuity contract claimants. Section 7435(a) specifies that, within each of the eight classes established for the distribution of assets, "[n]o subclasses shall be established."[17]

By requiring insurers in effect to afford certain contractholders preferential treatment over others, the Second Circuit's decision compels precisely the kind of unfair discrimination prohibited by Section 4224, and precisely the type of subclass explicitly rejected by Section 7435.[18] Under the Second Circuit's decision, an insurer faced with two contractholders, one an ERISA plan and one not, must favor the ERISA plan contractholder with fiduciary treatment

17. Section 7435(b) does permit an exception for claims under a "separate account":

> Every claim under a separate account agreement providing, in effect, that the assets in the separate account shall not be chargeable with liabilities arising out of any other business of the insurer shall be satisfied out of the assets in the separate account equal to the reserves maintained in such account for such agreement . . . .

Section 7435(b) is a statutorily created exception with no application to the general account funds at issue in this litigation.

18. Because Section 7435 groups all claims made under insurance policies and annuity contracts in a single class, any disparity in the treatment of annuity contractholders based upon their status under ERISA would effectively create a subclass in violation of Section 7435.

to which the other is not entitled.[19] Even if the terms of their contracts were identical, federal law would superimpose a differentiation that is not there and was not there when the contracts were purchased. It would, for example, require insurers to make investment decisions for ERISA contractholders based upon a different standard from that applied to other contractholders of the same class, perhaps to the detriment of such other contractholders, and possibly to allocate income and expenses to ERISA contractholders on a preferential basis. Such a result is inconsistent with the basic investment and income and expense allocation standards embodied in Articles 14 and 42 of the Insurance Law, and contrary to statutory provisions intended to promote equitable treatment of and avoid unfair discrimination among the holders of policies or contracts.[20] This result contradicts ERISA's saving

19. Under New York law, an insurance company is not a fiduciary to its policyholders. *See, e.g.*, *Rochester Radiology Assocs. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985); *Rhine v. New York Life Ins. Co.*, 289 N.Y.S. 117, 130 (1st Dep't), *aff'd*, 6 N.E.2d 74 (1936). An insurance company has long had discretion under New York law in the management of its assets. *Rhine v. New York Life Ins. Co.*, 6 N.E.2d 74, 80 (N.Y. 1936).

20. Section 1405 of the Insurance Law regulates generally the investments of life insurers. Section 4239 authorizes the Superintendent to promulgate regulations "prescribing standards for the *equitable allocation of income and expenses* as among lines of business and as between investment expenses and insurance expenses" by life insurers (emphasis added). These standards, as established by Insurance Department Regulation No. 33, indicate that "[i]t is the responsibility of each life insurer to use only such methods of allocation as will produce a suitable and equitable distribution of income and expenses." N.Y. Comp. Codes R. & Regs. tit. 11, § 91.4(a)(1) (1993).

Other provisions of the Insurance Law also prohibit discrimination of the type the Second Circuit's decision requires. Section 3201 of the (continued...)

clause, and is inconsistent with the principles of fairness that are the foundation of New York's regulation of insurance.

5. The Second Circuit's Decision Creates Unanswerable Questions Of Fairness Regarding The Segregation Of "Plan Assets"

The segregation of "plan assets," if possible, would undermine principles of fairness in another sense as well. Because the assets in an insurer's general account are undifferentiated, there is no principled basis for treating any asset as a "plan asset" and others not. Any allocation would, fundamentally, be either arbitrary, unfair to all general account policyholders, or tautological. Insurers could, one imagines, allocate an undifferentiated percentage share of current general account assets to each of the thousands of ERISA plan investors. This approach, however, would render the decision below essentially meaningless.

The Second Circuit seems to be requiring that ERISA plan customers receive tailored asset packages designed by insurer personnel who are now ERISA plan fiduciaries. Because, however, some assets are more desirable—have a greater potential for profitability—than others, and any investment offers a distinctive mix of risk and potential reward, any special allocation of existing

20.(...continued)
Insurance Law authorizes the Superintendent to reject "any form of annuity contract . . . for delivery or issuance for delivery in this state, *if its issuance would be prejudicial to the interests of policyholders or members or it contains provisions which are unjust, unfair or inequitable*." N.Y. Ins. Law § 3201(c)(2) (McKinney 1985) (emphasis added). The Second Circuit's decision would effectively incorporate obligations into annuity contracts purchased by ERISA plans that would unfairly discriminate against other holders of general account contracts to which ERISA does not apply.

assets to pension plans will inevitably be unfair to those to whom the more desirable assets are not allocated. This will expose insurers, inevitably, to multiple lawsuits by disgruntled non-ERISA customers, and by unhappy ERISA plans (that purchased an undifferentiated share of a large pool of many types of assets and end up with their own mini-mutual fund).[21] It may, in addition, hobble the ability of the insurer to meet guarantees made to non-ERISA policyholders. The Second Circuit's decision would in effect require the intervention of the legislatures of all fifty States to resolve a dilemma that, from the State regulator's point of view, should never have arisen at all. Congress cannot have intended such a dramatic intrusion on a heretofore fully functional and fair regulatory system.

D. Application Of The Second Circuit's Decision Would Enormously Complicate The State Regulation Of Insurance

The application of the Second Circuit's decision will have an enormous impact both on the administration of the Insurance Law by the Department and on the insurance industry's handling of the billions of dollars contributed under group annuity contracts such as GAC 50. The ruling will expose insurers to potentially large liabilities for breach of heretofore unimagined fiduciary obligations under ERISA, including challenges to investment, income allocation, and dividend practices that comply with State law. Insurers will somehow also have to bring their general accounts into compliance with State law, notwithstanding the court-mandated

21. Because this potential for liability (and the uncertainty regarding the status of general account assets subject to ERISA fiduciary obligations) would apply only to insurers writing ERISA-related business and would have the most severe impact on those insurers with the largest volume of such business, affirmance of the Second Circuit's decision could deter insurers from writing such contracts at all.

reallocation of most of those assets; or, more likely, it will require a thorough rewrite of State law itself.

If upheld, the Second Circuit's decision would effectively require a two-tiered regulatory scheme that the Department would have to oversee in areas of insurance law involving ERISA-covered pension plans: one State-law tier applying to non-ERISA funds and ERISA funds not considered plan assets, and one federal tier for funds deemed plan assets. As demonstrated above, such a change would necessarily and extensively complicate the Department's regulation of insurance, including the Department's evaluation of the solvency of insurers.[22]

To avoid what can accurately be described as a dramatic and unwarranted revolution in the regulation of insurance in all fifty States—and in keeping with the common understanding of Congress, the New York and Massachusetts Departments of Insurance, the United States Department of Labor, the insurance industry, and its customers—the Court should reverse the Second Circuit's decision.

22. Until now, all general account assets of an insurer have been available to satisfy all of the insurer's general obligations, without regard to the identity or status of particular policyholders or contractholders. Insurers have to date prepared financial statements and the Department has reviewed them on that basis. The Second Circuit's decision, however, suggests that certain general account assets may not be available for those purposes, and therefore calls into question the accuracy of the information currently provided in such statements. It should be noted that a wide segment of the public, including policyholders, contractholders, lending institutions, investors, investment bankers, reinsurers, and other insurers, relies on insurers' statutory financial statements for accurate information regarding admitted assets and liabilities.

CONCLUSION

For all the foregoing reasons, *amici curiae* the Attorneys General of the State of New York and the Commonwealth of Massachusetts, on behalf of the Superintendent of Insurance of the State of New York and the Commissioner of the Division of Insurance of the Commonwealth of Massachusetts, respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Second Circuit.

May 20, 1993

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No. 92-1074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust
No. 2,
Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF *AMICUS CURIAE*
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INTEREST OF *AMICUS CURIAE**

The American Council of Life Insurance (the "Council") is a national trade association representing 634 life insurance companies which, in the aggregate, have approximately 93% of the assets of all United States life insurance companies and 98% of the insured pension business. By virtue of their sales of group annuity contracts and other pension products to employee benefit plans, these companies play a major role in the nation's retirement system. The Council estimates that, by year-end 1991, retirement benefits covering over 59.3 million participants and beneficiaries under private pension plans in the United States were funded through contracts issued by life insurance companies. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book* 54-60 (1992).

Of a total $746 billion of reserves held by life insurance companies under annuity contracts with retirement plans as of year-end 1991, *id.* at 58, about $565 billion were held under "general account" contracts. These contracts provide for the assumption by an insurer of various risks associated with the provision of benefits to plan participants and beneficiaries. Money paid to an insurance company under general account contracts becomes part of the insurer's unsegregated general corporate assets, usually referred to as the insurer's general account assets.

The Council has a vital interest in this case. The Second Circuit has ruled that the issuance of a common form of general account contract to an employee benefit plan subjects an insurer's management of its general account assets to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Second Circuit's holding undermines the fundamental premises on which the insurance industry has sold billions of dollars of insurance contracts to retirement plans for over seven decades. ERISA's fiduciary responsibility provisions require a fiduciary to manage assets

* Petitioner and Respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

solely in the interest of and for the exclusive purpose of providing benefits to participants and beneficiaries of an ERISA-covered plan. Such requirements are fundamentally incompatible with the pooling of risks and collective management of assets which are necessary elements of a general account contract and the operation of an insurer's general account. Moreover, such requirements are fundamentally incompatible with state insurance regulatory standards which preclude the maintenance of any general account assets for the exclusive benefit of any particular contractholder and which mandate that insurers deal fairly and equitably with all contractholders as a group. Thus, as the State of New York has informed this Court, the Second Circuit's ruling, if allowed to stand, "would wreak havoc on the regulation of the insurance industry." Brief of *Amicus Curiae* The Attorney General of the State of New York in Support of the Petition for a Writ of Certiorari 4 ("New York Brief").

SUMMARY OF THE ARGUMENT

General account assets are not, and under state insurance laws cannot be, segregated and managed exclusively for the benefit of particular contractholders. Consequently, trust law has long recognized that an insurer does not become a fiduciary to the purchaser of a general account contract. ERISA's text and legislative history evidence no congressional intent to depart from this traditional characterization of such contracts, nor an intent to impose a scheme of federal regulation which is incompatible with the traditional operation and regulation of such contracts.

With its codification of trust law principles, ERISA imposes fiduciary responsibilities on those persons who manage "plan assets." 29 U.S.C. § 1002(21)(A)(i). Although the statute does not define the term "plan assets," ERISA section 401(b)(2) specifically excludes from "plan asset" status the consideration received under a "guaranteed benefit policy," defined as a contract or policy of insurance "to the extent that [it] provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C.

§ 1101(b)(2). This exclusion, understood in the context of the traditional operation and treatment of general accounts, is properly construed to include all traditional forms of general account contracts, including the one at issue in this case. These contracts provide that the entirety of contract funds can be applied to fund an insurer's payment of fixed, guaranteed benefit payments to employee benefit plan participants and beneficiaries. Confirming this view of the statute, the Department of Labor ("DOL") has unequivocally stated that the consideration placed by an insurer in its general account "shall not be considered to be plan assets." 29 C.F.R. § 2509.75-2.

In *Mack Boring & Parts v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), the Third Circuit properly interpreted the language of section 401(b)(2) in accordance with its intended meaning and DOL's authoritative guidance. The Third Circuit's interpretation, moreover, is compatible with the commercial and regulatory environment that formed the background to ERISA's enactment.

The Second Circuit, in contrast, misconstrues or ignores important phrases of the statutory text and DOL's construction. *Harris Trust & Savings Bank v. John Hancock Mutual Life Insurance Co.*, 970 F.2d 1138 (2d Cir. 1992), *aff'g in part and rev'g in part*, 722 F. Supp. 998 (S.D.N.Y. 1989) *and* 767 F. Supp. 1269 (S.D.N.Y. 1991). The court's conclusion, that so-called "free funds" under the Hancock contract are "plan assets" for ERISA fiduciary purposes, is also inadministrable. No particular general account assets can legally or practically be attributed to such funds or any portion of a traditional general account contract. Finally, the Second Circuit's interpretation fails to consider the significant conflicts that would result were insurer general account assets subject to both ERISA's fiduciary responsibility provisions and state insurance laws. It is clear from ERISA's "insurance saving clause," 29 U.S.C. § 1144(b)(2), and the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, that Congress sought to avoid such conflicts by reserving the regulation of the business of insurance

for the states. For these reasons, this Court should reverse the judgment of the Second Circuit that "free funds" under Hancock's contract constitute "plan assets."

BACKGROUND

With the enactment of ERISA, Congress "codif[ied] and [made] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (citations omitted). To understand why ERISA section 401(b)(2) cannot fairly be construed to make trust law principles applicable to general accounts, it is necessary to examine the critical distinctions between trust arrangements and general accounts which existed prior to ERISA's enactment and continue in effect today.

1. General Account Contracts Are Fundamentally Different from Trust Arrangements

Trust arrangements and general account insurance contracts traditionally have constituted the two primary vehicles through which retirement plans have accumulated funds to pay benefits to their participants and beneficiaries. Because those two vehicles are very different, they historically have been governed by fundamentally different schemes of regulation.

A plan placing funds in a trust account of a bank or other financial institution receives no guarantees from the trustee as to the investment performance of the trust's assets or their sufficiency to satisfy the plan's obligations to pay benefits.[1] Rather, the trustee simply obligates itself to invest the trust assets in a manner consistent with the plan's objectives and to return to the plan the trust assets as increased or diminished by investment results. Because

[1] James A. Hamilton, *Trust Fund Pension Plans*, *in* Life and Health Insurance Handbook 545 (Davis W. Gregg ed., 2d ed. 1964) ("[b]y its very nature, the trust fund cannot make guarantees of any sort"). Trust arrangements are described in Hamilton, *supra*, at 538-52; Dan M. McGill, Fundamentals of Private Pensions 285-89 (3d ed. 1975).

the plan retains all essential equitable attributes of ownership of the trust's assets, the common law characterizes the relationship between a plan and trustee as a fiduciary relationship. McGill (1975), *supra* note 1, at 286. This relationship requires the trustee to segregate the trust's assets from its own assets, and to manage them for the exclusive benefit of the plan. *Id.*; Restatement (Second) of Trusts §§ 2, 170 & 179 (1959). ERISA applies the same basic requirements to trust arrangements. *See* 29 U.S.C. §§ 1103(a), 1104(a)(1).

Insurance company general account contracts are a very different vehicle. They include various guarantees under which the insurer assumes risks related to the funding and distribution of plan benefits.[2] As under various other forms of individual and group insurance contracts involving the assumption of risks (*e.g.*, life insurance contracts and health insurance contracts), the consideration received from an employee benefit plan becomes part of the insurer's gen-

[2] An insurer's business of risk-assumption for pension contracts has been described as follows:

> The life insurance company is in the business of accepting risks and is willing to underwrite several different risks associated with pension plans and to underwrite them to varying degrees, depending on the employer's wishes. Some of these risks are as follows:
>
> 1. More people may live to retire than the assumed mortality tables anticipated.
> 2. Those who retire may live longer than the mortality tables anticipated.
> 3. The rate of interest earned on investments may fall below the anticipated level.
> 4. There may be defaults in the investment portfolio or it may be necessary to sell particular investments at a loss.
> 5. Expenses of handling the plan may be higher than anticipated.

S.S. Huebner & Kenneth Black, Jr., Life Insurance 569 (7th ed. 1969) (footnote omitted); *accord* Kenneth Black, Jr. & Harold D. Skipper, Jr., Life Insurance 494 (11th ed. 1987), *quoted in Harris Trust*, 722 F. Supp. at 1016 n.26.

eral account. No general account assets are segregated for the benefit of any particular contractholder or are specifically reserved for any particular contract. Rather, all general account assets are available to satisfy all of an insurer's obligations under each of its contracts.[3]

The maintenance of such an unsegregated account and its management for the collective benefit of all contractholders is essential to the pooling and equitable spreading of risks which lies at the heart of the business of insurance.[4] Plans that choose to purchase general account con-

[3] Dan M. McGill & Donald S. Grubbs, Jr., Fundamentals of Private Pensions 492 (6th ed. 1989) ("Under a life insurer's traditional mode of operation, all of its assets are held in one commingled account and are available for the satisfaction of any and all obligations of the company, regardless of their nature or source. The account is not labeled, since it is constituted of all the insurer's assets which are not earmarked for any particular obligations or segmented in any way."). Assets in an insurer's general account include its buildings, equipment and other operating assets as well as its stocks, bonds, real estate and other investment assets. From its general account, the insurer pays all of its operating expenses (*e.g.*, salaries, rent, taxes, etc.); all of its obligations to general creditors; all of its obligations to its life, health, annuity and other policyholders (other than policyholders participating in separate accounts); and dividends to participating policyholders and shareholders. For most companies, the greatest number of general account policyholders are individuals and entities other than employee benefit plans. *See Mack Boring*, 930 F.2d at 268 & n.2.

[4] In managing its business, an insurer must perform several major functions on an ongoing basis. These functions include the selection and control of its risks (underwriting), the investment and management of its assets, and the determination and allocation of its investment income and surplus. Because all general account assets stand behind all general account liabilities on an unsegregated basis, none of these functions is or can be carried out without careful consideration of the corporate-wide objectives of the insurer and the interests of all of its policyholders and other constituents. Principally, the objectives include (1) the need to maintain sufficient assets, surplus, and cash flow to meet all of the insurer's different obligations to its present and future contractholders and other constituents; and (2) the need to maintain equity among such contractholders and constituents in the consideration which the insurer charges and the manner in which investment income and surplus are allocated and distributed. *See* Robert E. Keeton & Alan

tracts do so with the full understanding that their payments to the insurer will become part of the insurer's general corporate assets and will not be managed solely in their interest or applied exclusively for their benefit. Indeed, they generally draw comfort from the fact that the contractual rights which they have acquired in exchange for such consideration will be supported on an unsegregated basis by a large pool of assets derived from various classes of business.

Recognizing the fundamental differences between the placement of funds in trust and the purchase of a general account insurance contract,[5] the common law characterizes the relationship between an insurer and a contractholder as contractual, rather than as a fiduciary relationship. *See* Restatement (Second) of Trusts § 12 comment k (when "payments are to be made out of the general assets of the insurance company, it holds nothing in trust and is not a trustee but is a debtor").[6] Because of the inapplic-

I. Widiss, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices § 8.2, at 938-39 (1988).

[5] A trust is defined as "a fiduciary relationship *with respect to property*, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person." Restatement (Second) of Trusts § 2 (emphasis added). The relationship of parties to a contract is that of promisor and promisee, obligor and obligee, or debtor and creditor. 76 Am.Jur.2d *Trusts* §§ 15, 46-47 (1992). General account contractual relationships lack the element of an identifiable and divisible property, which is at the heart of a trust arrangement. *Id.; In re Black & Geddes, Inc.*, 35 B.R. 830, 836 (S.D.N.Y. 1984) (citing state and federal cases for the proposition: "It is a firmly established principle that if a recipient of funds is not prohibited from using them as his own and commingling them with his own monies, a debtor-creditor, not a trust, relationship exists.").

[6] *See, e.g., Equitable Life Assur. Soc'y v. Brown*, 213 U.S. 25, 46 (1909) (under New York law, "'it cannot be said that the [insurer] is, in any sense, a trustee of any particular fund for the [contractholder], or that it acts as to him and in relation to any such fund in a fiduciary capacity' "; quoting and following *Uhlman v. New York Life Ins. Co.*, 109 N.Y. 421 (1888)); *Rochester Radiology Assoc. v. Aetna Life Ins. Co.*, 616 F. Supp. 985, 988 (W.D.N.Y. 1985); *Gross v. Penn Mut. Life Ins. Co.*, 356 F. Supp. 664, 666 (E.D. Pa. 1973) (following collected

ability of trust law requirements, insurers have been able to issue insurance contracts whose obligations are supported by commingled assets, the management of which is not and cannot be undertaken solely on behalf of any particular contractholder.

The interests of employee benefit plans and other general account contractholders are protected by state insurance laws. These laws are designed to assure that all contractholders are treated equitably and on a non-discriminatory basis, and that an insurer is able to satisfy its contractual obligations to all its contractholders. New York Brief, *supra* p. 2, at 5-7. In addition, employee benefit plan contractholders may seek judicial relief to redress an insurer's breach or violation of its contractual commitments. Plan contractholders and their participants and beneficiaries are protected, as well, by the fiduciary requirements placed on the plan sponsor (*i.e.*, employer or union), trustee, or other plan representative who is responsible for the prudent selection, monitoring, and disposition of these contracts.[7]

2. All Traditional General Account Contracts, Including the Unallocated General Account Contracts at Issue in this Case and in *Mack Boring*, Provide in Their Entirety for Guaranteed Benefits

ERISA section 401(b)(2) expressly excludes from the statute's fiduciary responsibility provisions the manage-

cases); *Mutual Ben. Life Ins. Co. v. Ellis*, 125 F.2d 127, 130 (2d Cir.) ("Surely the proceeds of the policies left with the company were not intended to be earmarked and could not be regarded as property equitably belonging to [the policyholder] which would be unavailable to satisfy claims of the company's creditors. Restatement, Trusts, § 12 and § 14, Illustration 3; 1 Scott on Trusts, pp. 87, 93, 94."), *cert. denied sub nom. Eisenlord v. Ellis*, 316 U.S. 665 (1942).

[7] *Harris Trust*, 970 F.2d at 1145; *District 65, U.A.W. v. Harper & Row Publishers, Inc.*, 696 F. Supp. 29, 33 (S.D.N.Y. 1988); Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974) [hereinafter ERISA Conference Report], *reprinted in* 1974 U.S.C.C.A.N. 5038, 5079.

ment of consideration received under an insurance policy or contract which "provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2). The meaning of this exclusion is best understood with reference to the types of insurance contracts that have been commonly used as vehicles for the funding and distribution of retirement benefits, both before and after ERISA's enactment.

The ultimate purpose of insurance company contracts issued to retirement plans has been to enable plans to provide annuities and other benefits to plan participants and beneficiaries. In the case of general account contracts, the annuity benefits are guaranteed (fixed) in amount and do not vary with the investment performance of the underlying general account assets.[8]

At issue in both this case and *Mack Boring* are "unallocated" general account contracts. These are the most popular form of insurance contracts sold to retirement plans both before and after ERISA's enactment.[9] Under "unallocated" contracts, deposits and other contributions are credited to an unallocated account, and are generally not applied to the payment or purchase of guaranteed

[8] McGill & Grubbs (1989), *supra* note 3, at 526 ("[T]he general principle and tradition [is] that *all contractual guarantees of a life insurer are obligations of the general asset account*. The *guarantees are fixed-dollar obligations*, payable without adjustment for fluctuations in the market value of the underlying assets." (emphasis added)).

[9] The traditional forms of unallocated contracts are the deposit administration contract (DA), which was at issue in *Mack Boring*, and the immediate participation guarantee contract (IPG), which is a modified form of DA and is at issue in this case. DA and IPG contracts are described in Morgan H. Alvord, *Deposit Administration and Separate Accounts*, *in* Life and Insurance Handbook 525, 530-33 (Davis W. Gregg ed., 2d ed. 1964); Huebner & Black (1969), *supra* note 2, at 572-74; Douglas B. Hunter, *Funding Instruments—Deposit Administration Contracts and Separate Accounts*, *in* Life and Health Insurance Handbook 614, 619-22 (Davis W. Gregg & Vane B. Lucas eds., 3d ed. 1973); McGill (1975), *supra* note 1, at 261-80; McGill & Grubbs (1989), *supra* note 3, at 550-64.

benefits until a participant retires.[10] The unallocated account of these contracts is a bookkeeping device that keeps track of the dollar value of the amounts contributed by the contractholder and allocated in the insurer's general account, less amounts that are applied to the purchase or payment of benefits.[11] The insurer guarantees the preservation of the principal balance of the bookkeeping account.[12] It also guarantees the rates at which the funds reflected in the bookkeeping account can be applied to the purchase of guaranteed benefits for participants. *See* authorities cited *supra* note 12.

Most unallocated contracts, including those at issue in this case and in *Mack Boring,* credit interest to the unallocated account based in whole or in part on the insurer's investment results.[13] While credited interest (*i.e.*, investment return to the plan sponsor as contractholder) may vary with the insurer's investment results, the insurer guarantees that its payment of fixed benefits to plan par-

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[10] McGill (1975), *supra* note 1, at 261-63 & 278; *see* Alvord (1964), *supra* note 9, at 530 & 532-33; Huebner & Black (1969), *supra* note 2, at 572-73. In contrast, under most forms of "allocated" contracts in use when ERISA was enacted, premiums are applied immediately to purchase deferred guaranteed annuities and other fixed benefits for participants, even though benefits are not yet payable under the plan. *See* McGill (1975), *supra* note 1, at 225-26.

[11] *Mack Boring,* 930 F.2d at 268. The unallocated account may be referred to by names such as "accumulation fund," "deposit administration fund," and "IPG account." Alvord (1964), *supra* note 9, at 530 & n.2 & 533; McGill (1975), *supra* note 1, at 262 & 278.

[12] Alvord (1964), *supra* note 9, at 530-31; Huebner & Black (1969), *supra* note 2, at 572-74; Hunter (1973), *supra* note 9, at 619-20.

[13] Alvord (1964), *supra* note 9, at 531 & 533; Huebner & Black (1969), *supra* note 2, at 572-73; Hunter (1973), *supra* note 9, at 619 & 621. Virtually all "allocated" contracts (*supra* note 10) also provide for the plan sponsor's participation in the insurer's investment results, through experience (rate) credits or dividends, to the extent that the insurers' actual investment and mortality experience is better than the investment and mortality assumptions upon which the price of the annuities purchased under the contract were based. McGill (1975), *supra* note 1, at 258-59; McGill & Grubbs (1989), *supra* note 3, at 547-48.

ticipants which are funded from the account will not vary in amount based on such investment results, *see supra* note 8, and that all funds allocated to the account may be used to provide such benefits.[14] Accordingly, like any other traditional form of general account contract, unallocated contracts in their entirety "provide[ ] for benefits the amount of which is guaranteed." As will be demonstrated herein, the Second Circuit's interpretation of ERISA section 401(b)(2) confuses the nature of the *benefits* provided to plan participants and beneficiaries under a general account contract (which are invariably guaranteed) with the nature of the *investment returns* to the plan sponsor (which are rarely fully guaranteed).

3. Separate Account Facilities Are Similar to Trust Arrangements and Do Not Offer the Guarantees of a General Account

Under section 401(b)(2), a contract is a guaranteed benefit policy only "to the extent that" it provides for guaranteed benefits. This statutory language was intended to distinguish between guaranteed benefits supported by a general account and variable benefits supported by an insurance company "separate account."[15]

Because of the nature of general accounts and their regulation under state insurance laws, insurers traditionally were limited to offering only general account contracts providing for the payment of fixed benefits to plan par-

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[14] Huebner & Black (1969), *supra* note 2, at 573 (under IPG, like DA, contracts "the life insurance company guarantees that the annuities for retired employees will be paid in full"; under IPG contracts, "If the employer allows the fund to fall below the critical level and the contract enters the second stage, the amount in the fund is used to establish fully guaranteed annuities and the fund itself ceases to exist."); *accord* Alvord (1964), *supra* note 9, at 531 & 533; McGill (1975), *supra* note 1, at 263 & 278; McGill & Grubbs (1989), *supra* note 3, at 552 & 563-64.

[15] *See infra* pp. 19-20. Separate accounts are described in Alvord (1964), *supra* note 9, at 534-36; Huebner & Black (1969), *supra* note 2, at 574; Hunter (1973), *supra* note 9, at 623-24; McGill (1975), *supra* note 1, at 280-83; McGill & Grubbs (1989), *supra* note 3, at 494-97.

ticipants.[16] During the early 1960's, most states amended their insurance laws to authorize the establishment of separate accounts for use to pay annuity benefits which vary in amount with the investment performance of the assets allocated to the separate account ("variable annuities").[17]

Besides their use to pay variable benefits,[18] separate accounts are fundamentally different from general ac-

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[16] *See supra* note 3. Significantly, in 1957, the Connecticut Supreme Court held that variable annuity benefits could not be paid with respect to a general account contract. *See Spellacy v. American Life Ins. Ass'n*, 131 A.2d 834 (Conn. 1957). By the time of ERISA's enactment, most states had adopted legislation or regulations authorizing the use of separate accounts in connection with variable annuities. *See* McGill (1975), *supra* note 1, at 203 ("A life insurance company places the assets of a variable annuity pension plan (or the variable component of an overall pension plan) in a separate account, distinct from the general asset account of the company."); *accord* Huebner & Black (1969), *supra* note 2, at 574; Hunter, *supra* note 9, at 624; DOL Advisory Op. 78-8A (Mar. 13, 1978) (stating DOL's "understanding that the various state laws which regulate insurance companies prohibit an insurance company from placing premiums paid for variable annuity contracts in a general asset accounts"); *see also* statute cited *infra* note 23.

[17] *See supra* note 16. Another purpose of separate accounts was to enable insurers to better compete with bank trusts by offering retirement plans the types of segregated and customized investment management services which were unavailable through a general account. *See* McGill (1975), *supra* note 1, at 280-81.

[18] A typical unallocated group annuity contract may offer both general and separate account facilities. Some of these contracts provide only for the payment of fixed benefit annuities guaranteed in amount by the general account. Alvord (1964), *supra* note 9, at 535 ("At the time of [a participant's] retirement, sufficient amounts are withdrawn from the [unallocated general account] fund or the separate account to provide the annuity payments to which the employees are entitled under the pension plan. These annuities are fixed in amount and do not vary with investment experience, as is the case with variable annuities.") Other forms of these contracts permit the plan sponsor to use separate account funds to purchase both fixed annuities and variable annuities. McGill (1975), *supra* note 1, at 282 ("The separate account funds under a deposit administration contract may be used for the purchase of immediate [fixed] annuities in accordance with a stipulated schedule of annuity rates. The sums paid for fixed-income immediate annuities are transferred to the general asset account, but sums set aside for asset-

counts, and substantially the same as trusts, in two other principal respects. First, retirement plan funds allocated to a separate account are legally segregated from an insurer's general corporate assets and (like trust assets but unlike general account assets) are managed exclusively for the benefit of the plan or plans which contribute to the account. *See* authorities cited *supra* note 15. Second, under all forms of separate account contracts in use when ERISA was enacted, the insurer provided no guarantees regarding the principal balance of the funds accumulating in the separate account; such funds always fluctuated dollar for dollar with the investment performance of the underlying separate account assets.[19]

ERISA's legislative history reflects Congress's intent to subject the management of separate account assets to the statute's fiduciary responsibility provisions, because of the similarity of separate accounts to trusts. *See* ERISA Conference Report, *supra* note 7, at 297 ("[I]t is understood that assets placed in a separate account managed by an insurance company are *separately managed* and the *insurance company's payments generally are based on the investment performance of these particular assets*. Consequently, insurance companies are to be responsible under the general fiduciary rules with respect to assets held under separate account contracts, and the assets of these contracts are to be considered as plan assets. . . ." (em-

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based (variable) annuities are held in a separate account maintained for the underwriting of such annuities.").

[19] McGill (1975), *supra* note 1, at 281-82 ("[The insurer] promises neither preservation of principal nor a minimum rate of return. The account is maintained on a market value basis and the actual investment experience, including realized and unrealized capital gains and losses, is reflected directly and immediately in the status of the account."); *accord* Huebner & Black (1969), *supra* note 2, at 574. Subsequent to ERISA's enactment, insurers began offering investment guarantees with respect to certain separate accounts that were used to fund guaranteed interest contracts. *See id.* at 500; Proposed Class Exemption for Guaranteed Investment Contract Separate Accounts, 45 Fed. Reg. 51303, 51304 (Aug. 1, 1980).

phasis added)), *reprinted in* 1974 U.S.C.C.A.N. at 5077.[20] No similar intent was expressed with regard to any type of general account contract or portion of general account assets.

ARGUMENT

A. THE LANGUAGE OF ERISA MANIFESTS NO INTENT TO ALTER THE TRADITIONAL REGULATION AND OPERATION OF INSURERS' GENERAL ACCOUNTS

ERISA's text suggests no intention to depart from the traditional characterization of general accounts or to impose upon them a scheme of regulation which was incompatible with their customary operation and regulation under state insurance laws.

As under common law, ERISA's fiduciary provisions do not apply to all parties who enter into contracts with an employee benefit plan. They apply only to a "fiduciary," which is defined to include any person who "exercises any authority or control respecting the management or disposition of [*a plan's*] *assets*." 29 U.S.C. § 1002(21)(A)(i) (emphasis added). Although the term "assets of the plan" ("plan assets") is used in many ERISA provisions, it is not comprehensively defined. But the plain and ordinary meaning of the term "assets of the plan" cannot reasonably be construed to apply to an insurer's own unsegregated general corporate assets merely because some of those assets are derived from contributions made under an insurance contract issued to an employee benefit plan.

The exclusion of general account assets from the fiduciary rules is confirmed in the only ERISA provision expressly addressing plan asset status. ERISA section 401(b) provides that the underlying assets of a mutual fund (reg-

[20] This treatment also is reflected in ERISA's reporting provisions, which require that certain financial information be provided as to the "assets of a plan" held by banks under various trust arrangements and the "assets of a plan" held by insurance companies in their separate accounts. 29 U.S.C. § 1023(a)(2)(A)-(B), (b)(3)(G). There is no similar statutory reference to assets held in a general account.

istered investment company) or insurance company do not become plan assets by virtue of an employee benefit plan's purchase of a mutual fund security or a "guaranteed benefit policy," as the case may be. 29 U.S.C. § 1101(b). The common feature of these two exclusions from plan asset status (and the fiduciary rules) is that both mutual funds and insurance companies are subject to other existing well-developed regulatory schemes.[21]

The guaranteed benefit policy provision of section 401(b)(2) provides, in its entirety:

> (2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer.
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> . . . .
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> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

29 U.S.C. § 1101(b)(2).

[21] *See* ERISA Conference Report, *supra* note 7, at 296 ("Since mutual funds are regulated by the Investment Company Act of 1940 and, since (under the Internal Revenue Code) mutual funds must be broadly held, it is not considered necessary to apply the fiduciary rules to mutual funds merely because plans invest in their shares."), *reprinted in* 1974 U.S.C.C.A.N. at 5077; Proposed Regulations Relating to Definition of Plan Assets, 44 Fed. Reg. 50363, 50364 (Aug. 28, 1979) (§ 401(b)(2)'s "exemption for contracts or policies issued by insurers and *funded by insurer's general accounts* also appears to be based upon the fact that the plan benefits provided under such contracts or policies are insured by an *entity which is subject to state regulation designed to assure the entity's ability to pay benefits specified in the policy when due*." (emphasis added)).

An insurance policy comes within section 401(b)(2)(B): 1) "to the extent that," 2) it "provides for," 3) "benefits" the "amount of which is guaranteed," 4) including "surplus in a separate account" but excluding "any other portion of a separate account." As demonstrated below, these elements, taken together and applied with a view to long-standing commercial arrangements of which Congress must have been aware when it enacted ERISA, support the conclusion that a traditional unallocated general account contract is a "guaranteed benefit policy" in its entirety.

B. THE "GUARANTEED BENEFIT POLICY" EXCLUSION FROM PLAN ASSET STATUS ENCOMPASSES ALL TRADITIONAL GENERAL ACCOUNT CONTRACTS IN THEIR ENTIRETY

In *Mack Boring*, the Third Circuit held that the entirety of an unallocated general account contract was a guaranteed benefit policy, because the entire amount represented by the unallocated account could be applied immediately or in the future to purchase fixed guaranteed benefits for plan participants and beneficiaries. *Mack Boring*, 930 F.2d at 273-75. The Second Circuit, on the other hand, concluded that if any portion of the funds held under a general account contract are not immediately applied to support the costs of paying guaranteed benefits to participants, and no guarantees of investment returns on such funds are furnished to the plan sponsor (the contractholder), then "to [that] extent" the contract is not a guaranteed benefit policy and, consequently, such funds are plan assets. *Harris Trust*, 970 F.2d at 1144. Such a reading of the guaranteed benefit policy provision mistakenly assumes that the term "benefits" refers to amounts credited under the contracts to the plan sponsor. Such a reading also ignores the phrase "provides for" and fails to attach any significance to the "separate account" language of section 401(b)(2)(B).

1. "Benefits" the "Amount of Which Is Guaranteed"

The basic scope of the guaranteed benefit policy provision is expressed in terms of the "benefits" provided by

the policy. Thus, the essential starting point for the statute's interpretation is a proper understanding of what "benefits" are for purposes of ERISA. Here again, the statute provides no express definition. But numerous provisions in the statute and the customary meaning of the term leave no doubt that it refers to payments to plan participants or their beneficiaries.

"Benefits" is used throughout ERISA itself and customarily in the life insurance industry to mean a payment to a plan participant or beneficiary.[22] Indeed, a primary requirement of ERISA's fiduciary rules is that plan assets must be used "for the exclusive purpose of . . . *providing benefits* to participants and their beneficiaries." *See* 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added). Thus, this is a "classic case for application of the 'normal rule of statutory construction that " 'identical words used in different parts of the same act are intended to have the same meaning.' " ' " *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted).

A traditional general account contract provides only for "benefits the amount of which is guaranteed." *See supra* notes 8 & 14 and accompanying text. Unlike the variable investment returns that may be credited to plan sponsors, the contractual benefits paid to plan participants (including all benefits under the Hancock contract) do not vary with the insurer's investment experience. *Id.* The Second Circuit concluded that the Hancock contract provided for benefits that were not guaranteed in amount, because the interest credited to the contractholder plan sponsor on the free funds portion of the contract was "dependent upon the insurer's investment experience and therefore *variable*

[22] A few of the many ERISA examples are listed in *Mack Boring*, 930 F.2d at 273, and by the district court in this case, *Harris Trust*, 722 F. Supp. at 1017-18. For illustrations in the insurance industry, see, e.g., N.Y. Ins. Law § 161(1)(d) (1966) ("The benefits payable under any such policy shall be payable to the beneficiary or beneficiaries designated by the insured"); Walter J. Couper & Roger Vaughan, Pension Planning: Experience and Trends 190 (1954) (glossary: "*Benefit:* The amount payable to a participant or his beneficiaries under a plan.").

with respect to the benefits it provides." *Harris Trust*, 970 F.2d at 1143 (emphasis added). This conclusion should be rejected, because it fails to construe the term "benefits" in accordance with its usage elsewhere in the statute. *See Mack Boring*, 930 F.2d at 273 ("Payments made to plan sponsors can be variable without taking a DA contract out of the safe harbor created for guaranteed benefit policies.").

As the sole support for its conclusion, the Second Circuit cited language in the ERISA Conference Report, *supra* note 7, which states: "If the policy guarantees basic *payments* but other *payments* vary with, *e.g.*, investment performance, then the variable part of the policy and assets attributable thereto are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules." *Id.* at 296 (emphasis added), *reprinted in* 1974 U.S.C.C.A.N. at 5077. The Second Circuit's reading of this language attributes far too much significance to the use of the word "payments" instead of "benefits." In context, it is clear that nothing more than a synonym for benefits was intended.[23] In any event, the Conference Report cannot reasonably be used to give the statutory word "benefits" a meaning different from its uniform usage elsewhere in ERISA. *Mack Boring*, 930 F.2d at 275 ("there is no indication that the word 'payments' in the Conference Report has a meaning different from the meaning we give to the word 'benefits' in the statute"); *Harris Trust*, 722 F. Supp. at 1017-18 ("The word 'benefit' in the guaranteed benefit policy exception, and the word 'payment' in the conference report, are no different; they too refer to benefits and payments to covered employees.").

[23] The Conference Report's reference to payments that "vary" with "investment performance" is consistent with language in state insurance codes, when ERISA was enacted, defining variable annuity contracts supported by separate accounts. *See, e.g.*, Mass. Gen. L. ch. 175, § 132G (1970) ("Contract on a variable basis" means "any contract . . . providing for the amount of benefits or other contractual payments or values thereunder to *vary*, in whole or in part, so as to reflect the *investment results* of a *separate investment account or accounts* established under this section in which amounts received in connection with any such contract have been placed" (emphasis added)).

2. "Provides for"

The phrase "provides for" is significant in the context of the unallocated contracts which have been commonplace since long before ERISA's enactment. As discussed above, amounts invested in an unallocated general account contract are credited to a bookkeeping account which the plan sponsor can use to purchase fixed annuities when plan participants become eligible for benefits. *See supra* pp. 9-11. The phrase "provides for" tersely captures the essence of this arrangement.

As commonly understood, the term "provides for" is not limited to immediate action, but also includes measures in preparation. *Mack Boring*, 930 F.2d at 273 ("The dictionary definition of 'provide' is to 'make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.' Black's Law Dictionary (5th ed. 1979)."). In this case, it is uncontested that all funds credited to the Hancock contract, including "free funds," can be used to provide for future guaranteed benefits to participants. Thus, the entire unallocated contract "provides for" guaranteed benefits.

The Second Circuit concluded that free funds are not covered by the guaranteed benefit policy provision because they do not support the *immediate* payment to participants of guaranteed benefits. This construction ignores the plain meaning of the term "provides for." As the Third Circuit explained: "A DA contract clearly 'makes, procures or furnishes for the future use' of the plan participants a fixed amount of benefits. Section 401(b)(2)(B) does not, on its face, require that the benefits contracted for be delivered immediately, and we will not read into the statute such a requirement." *Mack Boring*, 930 F.2d at 273.

3. "To the Extent That"

The foregoing analysis of the phrases "benefits" and "provides for" furnishes the proper context for construing

the phrase "to the extent that." A typical unallocated contract may combine both general and separate account features, providing both for guaranteed benefits to participants paid through the general account and variable annuity benefits paid to participants through a separate account. *See supra* note 18. Such a contract is a guaranteed benefit policy only "to the extent that" it provides for guaranteed benefits (*i.e.*, only to the extent of the general account portion of the contract). *Mack Boring*, 930 F.2d at 274.

The "to the extent that" language is not determinative of the application of section 401(b)(2) to the contracts in *Mack Boring* and in this case. Neither contract provides for variable benefits. Both contracts provide only for benefits that are guaranteed in amount, irrespective of the investment performance of the free funds (or any other general account funds). The Second Circuit erred in its conclusion that general account contracts may not be guaranteed benefit policies to the extent that they provide for variable investment returns for plan sponsors. As demonstrated above, such returns are not "benefits."

4. Including "Surplus in a Separate Account" But Excluding "Any Other Portion of a Separate Account"

The conclusion that a general account contract does not fall outside of the definition of a guaranteed benefit policy "to the extent that" it provides for variable investment returns to the plan sponsor is reinforced by section 401(b)(2)(B)'s second sentence, which expressly excludes separate account assets (other than separate account surplus) from the definition of guaranteed benefit policy. Under contracts commonly in use at the time of ERISA's enactment, the entire amount of separate account funds available to the plan sponsor always fluctuated dollar for dollar with the investment performance of the underlying separate account assets. *See supra* note 19 & accompanying text. Thus, if Congress had intended for the first sentence of section 401(b)(2)(B) to exclude from the definition of a guaranteed benefit policy those portions of a

contract which provide for variable investment returns to the plan sponsor, as the Second Circuit so construed, all separate account assets would have been excluded from the definition of guaranteed benefit policy even in the absence of section 401(b)(2)(B)'s second sentence. The Second Circuit's construction thus contradicts a fundamental principle of statutory construction that "an interpretation of a statute [is to be avoided if it] renders any part of it superfluous and does not give effect to *all of the words* used by Congress." *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir. 1987) (emphasis added); *see Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2384 (1992) (it is the Court's "duty to " 'give effect, if possible, to every clause and word of a statute" ' ") (citations ommitted).

But the second sentence was not superfluous. Many forms of contracts issued to employee benefit plans permit contributions to both the general account and separate accounts, but provide only for the payment of fixed benefit annuities guaranteed in amount through the general account. *See supra* note 18. Were it not for the presence of section 401(b)(2)(B)'s second sentence excluding separate account assets (other than surplus)[24] from the definition of guaranteed benefit policy, a contract of this nature would

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[24] The exclusion of all general account assets from treatment as plan assets is reinforced by the express inclusion of separate account "surplus" in the definition of guaranteed benefit policy. Separate account surplus is general account funds invested by the insurer to start-up a separate account and to provide for contingencies. *See e.g.*, 1969 Ga.L. 538, § 56-1040(j) (1969) ("[insurer] may allocate from its general accounts to each separate account . . . initial cash amount necessary to meet minimum capitalization requirements for such account"); *accord* N.C. Gen. Stat. § 58-7-95(c) (1969); *see also* ERISA Conference Report, *supra* note 7, at 297 ("to the extent that insurance companies place *some of their own funds* in these separate accounts to provide for contingencies, *this separate account "surplus"* is not to be subject to the fiduciary responsibility rules" (emphasis added)), *reprinted in* 1974 U.S.C.C.A.N. at 5077. In view of the outright exclusion of general account assets of an insurer invested in a separate account, it would be anomalous to apply ERISA's fiduciary responsibility rules to any other general account assets.

be treated as a guaranteed benefit policy in its entirety. In view of Congress's intent to impose fiduciary obligations with respect to separate account assets because of their similarities to trust arrangements, *see supra* pp. 13-14 & note 20, the second sentence "was necessary to close what would have [otherwise] been a very large loophole in the plan asset provisions of ERISA." *Mack Boring*, 930 F.2d at 274.

C. THE SECOND CIRCUIT'S INTERPRETATION IS INCAPABLE OF PRACTICAL APPLICATION, AND WOULD SUBJECT INSURERS TO CONFLICTING STATE AND FEDERAL REGULATION IN CONTRAVENTION OF CONGRESS'S EXPRESS INTENT

As demonstrated above, the non-application of ERISA's fiduciary responsibility provisions to an insurer's management of its general account assets is consistent with the statutory text. Moreover, it is consistent with Congress's clearly expressed intention not to disrupt state regulation of the business of insurance and with the absence of any evidence in the legislative history of ERISA of an intent to impose upon the management of insurance company general accounts a scheme of regulation which is fundamentally incompatible with their operation. On the other hand, the Second Circuit's interpretation of the text is incapable of practical application and subjects insurers to sharply conflicting state and federal schemes of regulation which would preclude the sale to retirement plans of traditional general account contracts which have been utilized by such plans for over seven decades.

The Second Circuit's interpretation of ERISA's guaranteed benefit policy provision assumes that Congress intended to subject certain "portions" of a general account contract to ERISA's fiduciary responsibility provisions while excluding other "portions." Such an interpretation not only ignores or misconstrues key phrases of the guaranteed benefit policy definition but also is incapable of practical application. While the Second Circuit concluded that it could bifurcate Hancock's contract into guaranteed and non-guaranteed "portions," the court made no attempt

to identify any specific general account assets attributable or referable to the "non-guaranteed" portion of the contract. Nor could it have done so, inasmuch as there are no such assets, either as to Hancock's contract or as to any other general account contract, in whole or in part. State law requires that all general account assets be available to support all general account liabilities.[25] It would be legally impossible for an insurer to set aside a portion of its general account assets for a particular contractholder (or more particularly, for a specific "portion" of a contract) or to manage any particular assets for the exclusive benefit of a particular contractholder whose contractual rights are supported by such assets. *See supra* note 25. Even if assets could be segregated within a general account, policyholders would be deprived of all of the benefits of having their assets supported by a large pool of assets derived from diversified risks, a result contrary to their expectations in purchasing their contracts and to the terms of their contracts.[26]

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[25] *Supra* notes 3 & 6. State insurance liquidation statutes give all contractholders and other claimants "equal priority of payment from general assets," Uniform Insurers Liquidation Act § 6(1), 13 U.L.A. 347 (1986) (promulgated 1939); N.Y. Ins. Law § 7413(a) (1984) (originally enacted 1940); and authorize insurance departments to dispose of all of an insurer's assets. New York Ins. Law § 7429(a); *see also id.* § 7435 (order of priority for distribution of assets).

[26] Recently, state insurance regulators have authorized several insurers to allocate the investment results of specific general account assets to particular lines of business through a procedure referred to as "segmentation." McGill & Grubbs (1989), *supra* note 3, at 501-03. However, such assets are not held exclusively for the benefit of those lines of business. The general account continues to operate as a single pool of assets, with all assets continuing to stand behind all general account obligations. *Id.* at 502 ("Claims of a particular segment of contractholders are not limited to assets dedicated to that segment but are enforceable against the entire general asset account."). For this reason, segmentation does not constitute a segregation of assets in the sense of a trust or separate account or as to which the insurer could manage specific assets exclusively for the benefit of employee benefit plan participants and beneficiaries, as ERISA § 404(a)(1)(A) would require.

If any portion of general account assets were deemed to be plan assets, fundamental conflicts would result from imposing ERISA's fiduciary responsibility provisions on the existing scheme of state insurance regulation, or the result would be effectively to preempt state regulation of general accounts. *See* New York Brief, *supra* p. 2, at 5-12 (summarizing conflicts and interference with state regulation); *Mack Boring*, 930 F.2d at 275 n.17 ("Whenever an insurance company acts 'solely in the interest' of a pension plan customer, it would violate state law.").[27] The Second Circuit did not even acknowledge, let alone offer any guidance as to how to resolve these conflicting requirements of federal and state law. As the Third Circuit aptly summarized, however: "[W]e do believe that if Congress had intended so severe a disruption of insurance practices, practices that had been in existence for almost three decades before the enactment of ERISA, it would have made its intention perfectly clear." *Mack Boring*, 930 F.2d at 275 n.17; *see Harris Trust*, 722 F. Supp. at 1020. Inasmuch as the primary focus of state regulation is on the operation of the general account, *see* New York Brief, *supra* p. 2, at 6-9, Congress's intent not to subject general accounts to ERISA's fiduciary rules is evidenced in ERISA's "insur-

[27] The Third Circuit also recognized that ERISA was expressly "designed to prevent a fiduciary 'from being put in a position where he has dual loyalties, and therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.' " 930 F.2d at 275 n. 17 (quoting *Levy v. Lewis*, 635 F.2d 960, 968 (2d Cir. 1980)). Numerous other circuit court opinions have declined to impose fiduciary status when to do so would result in dual loyalties. *See, e.g.*, *Useden v. Acker*, 947 F.2d 1563, 1576 (11th Cir. 1991), *petition for cert. filed* (June 1, 1992); *Levy v. Lewis*, 635 F.2d 960, 968 (2d Cir. 1980) (New York Superintendent of Insurance, in his capacity as rehabilitator of a financially troubled insurer, "is not the type of official whom Congress had in mind as an ERISA fiduciary. . . . Lewis's statutory obligation is to consider fairly the claims of all creditors of the bankrupt company; as a fiduciary, he could not help being put in a position of divided loyalty from the outset."); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985) (union negotiator); *Brandt v. Grounds*, 687 F.2d 895, 898-99 (7th Cir. 1982) (depository bank).

ance saving clause," under which any state law which regulates the "business of insurance" is saved from the application of ERISA's broad preemption provision. 29 U.S.C. § 1144(b)(2); *see FMC Corp. v. Holliday*, 498 U.S. 52, 58(1990); *see also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 736 (1985) ("Congress has indicated in the McCarran-Ferguson Act [15 U.S.C. § 1012(b)] that federal laws should not be construed to supersede state laws 'regulating the business of insurance.' ").

To construe section 401(b)(2)(B) as the Second Circuit did assumes that Congress intended to impose ERISA's fiduciary responsibility rules on the management of hundreds of billions of dollars of general account funds associated with thousands of contracts issued to ERISA plan contractholders.[28] While Congress clearly expressed its intention to subject separate account assets to ERISA's fiduciary responsibility provisions, *see supra* pp. 13-14 & note 20, neither the language of section 401(b)(2)(B) nor ERISA's massive legislative history evidences any similar intent with respect to general account assets. In view of the profound consequences to the insurance industry of the application of the fiduciary responsibility provisions to the management of general account assets, it is inconceivable that either the statute or its legislative history would be utterly silent if Congress had intended so significant a change. *See Mack Boring*, 930 F.2d at 275 n.17; *see also Massachusetts v. Morash*, 490 U.S. 107, 119 (1989) (regarding ERISA: "Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.' " (citation omitted)).

[28] The Council estimates that insurance companies held, by year-end 1991, over $314 billion of funds in their general accounts under unallocated contracts.

D. THE DEPARTMENT OF LABOR HAS CONSISTENTLY FOLLOWED THE APPROACH ADOPTED BY CONGRESS AND EXCLUDED GENERAL ACCOUNT ASSETS FROM PLAN ASSET TREATMENT

Because the statute lacked a comprehensive definition of plan assets, shortly following ERISA's enactment, the DOL issued its Interpretive Bulletin 75-2 ("IB 75-2"). 40 Fed. Reg. 31598 (July 28, 1975, issued Feb. 6, 1975) (currently codified at 29 C.F.R. § 2509.75-2). This bulletin describes certain types of assets, including general account assets, that do not constitute "plan assets":

> Generally, investment by a plan in securities . . . of a *corporation or partnership* will not . . . make such assets of the entity "plan assets" and thereby make a subsequent transaction between the party in interest and the corporation or partnership a prohibited transaction under section 406 of the Act.
>
> For example, if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its *general asset account*, the assets in such account shall not be considered to be plan assets. . . .

40 Fed. Reg. at 31598 (emphasis added).

As the agency charged with the administration of ERISA, the DOL's views on plan asset status are entitled to great deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Inasmuch as IB 75-2 was issued virtually contemporaneously with ERISA's enactment, and the DOL participated in drafting the statute,[29] deference is particularly appropriate here. *See Miller v. Youakim*, 440 U.S. 125, 144 (1979); *Udall v. Tallman*, 380 U.S. at 16.[30]

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[29] *See, e.g.*, Administration Recommendations to the House and Senate

The Second Circuit concluded that IB 75-2 defined "plan assets" only for purposes of ERISA's prohibited transaction provisions, 29 U.S.C. § 1106, but not for the statute's general fiduciary rules, 29 U.S.C. § 1103-1104, or other purposes. *Harris Trust*, 970 F.2d at 1145. This could not possibly have been the DOL's intent. ERISA nowhere contemplates that a party who exercises authority or control over the management or disposition of "plan assets" is to be an ERISA fiduciary for some purposes but not for others. Nor does ERISA authorize the DOL to define "plan assets" for one purpose but not for others.[31]

Conferees on H.R.2 to Provide for Pension Reform (April 1974), *reprinted in* III Legislative History of the Employee Retirement Income Security Act of 1974, at 5047 (Comm. Print 1976).

[30] The DOL not only recognized that IB 75-2 would receive judicial deference, it also encouraged reliance on its interpretation, as is evidenced in the following discussion between Congressman Erlenborn and DOL Assistant Secretary Paul J. Fasser in congressional hearings:

> Mr. Erlenborn. Now you mentioned one interpretive bulletin backed up by an IRS technical information release in the area of insurance funded plans. . . . [D]oes that have the force of law or is that only an advisory opinion?
>
> Mr. Fasser. In our judgment, its effect is the same as the technical information release that IRS has used successfully for many years. . . . and intend that they would have an *effect similar to that of a regulation.*

Oversight on the Employee Retirement Income Security Act of 1974: Hearings on Public Law 93-406 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 400-01 (May 1 & 6, 1975) (emphasis added). Congressman Erlenborn further inquired, "[i]f someone relies on" IB 75-2, "have you possibly lulled some plan administrators and insurance companies into a false sense of security that may ultimately wind up with their being held in private suit for violating the act." *Id.* at 401. Assistant Secretary of Labor Fasser responded, "We think not," one reason being that under cases such as *Udall v. Tallman* "the courts will give great deference to the interpretation of the administrating agency as defined by the Congress." *Id.*

[31] ERISA contains an administrative procedure for the DOL to grant exemptions from the prohibited transaction provisions. 29 U.S.C. § 1108(a). Prohibited transaction exemptions do not, however, relate to either plan asset or fiduciary status. Rather, they state that particular

The DOL's intention that IB 75-2 would apply for all purposes is reflected in numerous pronouncements subsequent to IB 75-2. Significantly, three months after IB 75-2 was issued, Assistant Secretary of Labor Fasser explained in congressional hearings that, in issuing IB 75-2, the DOL "exercised [its] authority to interpret the law . . . stating that the mere investment of plan assets by a plan in a corporate entity does not convert the assets of the corporation or partnership into plan assets and does not make the managers of the corporation or partnership fiduciaries to the plan." ERISA Oversight Hearings, *supra* note 30, at 391. In the same vein, in a November 1975 release explaining ERISA's financial reporting requirements, the DOL stated:

> Under an ERISA IB, 75-2, . . . the assets held in the general account of an insurance company are *not* plan assets. However, assets removed from the general account would once again be considered plan assets. Because all assets in an insurance company are held in either the general account or pooled or individual separate accounts, *reporting requirements are applicable only to plan assets—those held in a separate account.*

Employee Benefit Plans—Proposed Annual Reporting Requirements, 40 Fed. Reg. 53710, 53710 (Nov. 19, 1975) (emphasis added; citation omitted).[32] At no time has the DOL ever stated that IB 75-2 was confined to prohibited transactions, either as to insurance company general accounts or as to the assets of corporations and partnerships (also covered by IB 75-2) whose securities are purchased by employee benefit plans.

In 1986, the DOL adopted a comprehensive regulation defining the term "plan assets." Final Regulations Relating to the Definition of Plan Assets, 51 Fed. Reg. 41262 (Nov. 13, 1986) (codified at 29 C.F.R. § 2510.3-101) (hereinafter Plan Assets Regulation).[33] The regulation provides definitions that apply for all purposes. *Id.* at 41264-65. Although the Plan Assets Regulation supplanted (on a prospective basis only) a portion of IB 75-2 dealing generally with plan investments in corporations or partnerships, *see id.* at 41278, the DOL specifically noted that "the portion of Interpretive Bulletin 75-2 dealing with contracts or policies of insurance is not affected by the [plan assets] regulation." *Id.* at 41278. Thus, because the DOL "chose to affirm the viability of IB 75-2(b) in the context of a plan assets regulation, [this Court] must assume that the regulation speaks authoritatively with respect to plan asset identification." *Mack Boring*, 930 F.2d at 276; *see Harris Trust*, 722 F. Supp. at 1019 (with Plan Asset Regulations, the DOL "confirmed the interpretation it set out in Interpretive Bulletin 75-2").[34]

Ignoring this substantial history of DOL pronouncements, the Second Circuit nonetheless concluded that its construction of section 401(b)(2) was supported by two DOL advisory opinions. The Second Circuit failed to realize, however, that these two opinions involved separate accounts and, thus, were completely inapposite to the types

transactions involving a fiduciary (or party in interest) and plan assets do not violate the proscriptions against conflicts of interest.

[32] *See also* DOL Advisory Op. 75-79 (Feb. 7, 1975); Proposed Regulations Relating to Definition of Plan Assets, 44 Fed. Reg. 50363, 50364 n.4 (Aug. 28, 1979); Proposed Class Exemption for Guaranteed Investment Contract Separate Accounts, 45 Fed. Reg. 51303, 51304 (Aug. 1, 1980).

[33] Congress directed the DOL to "adopt final regulations defining 'plan assets' by December 31, 1986." Pub. L. No. 99-272, § 11018(d), 1986 U.S.C.C.A.N. (100 Stat.) 277-80.

[34] Another ground for questioning the Second Circuit is that it apparently concluded that the "guaranteed benefit policy" provision was an "exclusive" safe-harbor, so that any insurance company assets not falling within the definition constitute plan assets. By its express terms, however, § 401(b) defines only two limited circumstances in which assets are *not* plan assets. In no way does it purport to impose plan asset status in all other circumstances. The non-exclusivity of § 401(b) is evidenced in Congress's unbridled mandate in 1985 for the DOL to define plan assets in a comprehensive regulation. *See supra* note 33. The Plan Assets Regulation provides that "plan assets" do *not* include, among other things, the assets of an "operating company," 29 C.F.R. § 2510.3-101(a)(2)(i) & (c), or the assets of an entity that issues securities that are not "equity securities." *Id.* at § 2510.3-101(a)(2) & (b)(1). The Second Circuit failed to apply these two provisions to general accounts.

of traditional general account contracts at issue here and in *Mack Boring*. DOL Advisory Op. 78-8A (Mar. 13, 1978) (account that CREF "label[ed] . . . a 'general' account" provided for variable annuity benefits and "constitute[d] a separate account as defined by the Act"); DOL Advisory Op. 83-51A (Mar. 13, 1983) (certain "guaranteed contract separate accounts" do not contain plan assets); *see Mack Boring*, 930 F.2d at 276-77 n.18 (noting these distinctions); *Harris Trust*, 722 F. Supp. at 1019 (same). The DOL did not state that either opinion was intended to modify IB 75-2. Moreover, the DOL made clear that these advisory opinions were intended to "apply only to the situations described therein." DOL ERISA Procedure 76-1, § 10, 41 Fed. Reg. 36,281 (Aug. 27, 1976) (quoted in *Mack Boring*, 930 F.2d at 276 n.18). Finally, any doubt that these opinions were not intended to modify the DOL's position in IB 75-2 is eliminated by the DOL's reaffirmation of that interpretive bulletin, subsequent to the issuance of the advisory opinions, in connection with the Plan Assets Regulation.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the court of appeals that "free funds" constitute "plan assets."

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1992

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK,
AS TRUSTEE OF THE SPERRY MASTER
RETIREMENT TRUST NO. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE
[illegible] COURT OF APPEALS
[illegible] SECOND CIRCUIT

[illegible] CURIAE OF
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[illegible] RESPONDENT

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HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE OF THE SPERRY MASTER RETIREMENT TRUST NO. 2,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS AND LEGAL SERVICES FOR THE ELDERLY IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons age 50 or older, dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. One of AARP's primary goals is to promote the economic security

of individuals as they age, by increasing the availability, security, equity, and adequacy of public and private pension plans.

Legal Services for the Elderly (LSE) was founded in 1968 to provide free legal services to the elderly poor. At varying times, it has served as a national back-up center to all legal services offices in the country, as the United States Administration on Aging back-up center to their funded offices in New York and New Jersey, and continually as the only litigational back-up center in the State of New York.

It is presently funded by the federal Legal Services Corporation to provide legal advice and litigation support to all legal services attorneys in New York City in several areas of the law of concern to the elderly, including the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. It has on its staff a former member of the Department of Labor (DOL) ERISA Advisory Council appointed to represent all pensioners.

The National Employment Lawyers Association (NELA), formerly the Plaintiff Employment Lawyers Association, is a voluntary organization, founded in 1985, of over 1,500 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who represent individual employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters.

NELA has devoted itself to supporting remedial legislation and precedent-setting litigation affecting the rights of individuals in the workplace in Congress and in the federal and state courts. NELA has a direct interest in the law governing the construction and application of the Employee Retirement Income Security Act (ERISA) because the clients of NELA members frequently have claims for benefits that this statute governs. NELA is qualified to brief this Court on

the implications of its decision in this case, having participated as *amicus curiae* in numerous other cases involving employment laws, including the leading Supreme Court case on ERISA, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

Employees and retirees depend on the fiduciary protections that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., mandates for private employer-sponsored pension plans. In particular, ERISA's fiduciary protections are of vital concern to the elderly poor since the quality of their lives in retirement depends heavily on the amount of their pensions. The Court of Appeals' decision in this case protects retired and working Americans' interests in the approximately half trillion dollars of pension plan assets held by individuals and pension plans in group annuity contracts.[1] AARP, Legal Services for the Elderly, and NELA have a substantial interest in the resolution of the issue herein, which has a direct and vital bearing on retirement security, and therefore submit this brief *amici curiae*[2] to facilitate a full consideration by the Court of this issue.

SUMMARY OF ARGUMENT

In the decision below, the Court of Appeals held that the guaranteed benefit policy exclusion under ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2), does not apply to the non-guaranteed "free funds" portion of a group annuity contract issued to a pension plan. Accordingly, insurance companies are subject to ERISA's fiduciary rules when investing these non-guaranteed "free funds." This decision protects participants and beneficiaries from insurance

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[1] Amicus Brief of American Council of Life Insurance in Support of the Petition for a Writ of Certiorari at 1.

[2] The written consents of the parties have been filed contemporaneously with this brief with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

companies' breaches of fiduciary duties. Harris Trust & Savings Bank v. Hancock Mutual Life Insurance Co., 970 F.2d 1138 (2d Cir. 1992).

In contrast to this decision, the Department of Labor (DOL), by its own admission, interprets its regulation explaining the guaranteed benefit policy exclusion in a way that diminishes the protections under ERISA for participants and beneficiaries. *Amicus* Brief of the United States Supporting Petitioner at 17 n.9. The DOL's position is inconsistent both with ERISA's mandate to protect participants and beneficiaries and with previous positions the DOL has taken in its bulletins and regulations. Because of these inconsistencies, the Department of Labor's position is not entitled to deference. Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-213 (1988); United States v. Larionoff, 431 U.S. 864, 873 (1977).

Without protections provided by ERISA's fiduciary duty rules, participants and beneficiaries may lose the benefits of positive investment experience and may lose all protections from insurance companies' breaches of fiduciary duties. The Court of Appeals recognized that positive investment experience from the nonguaranteed portion of the group annuity contract affects the amount of funds available to the plan and the participants. Harris Trust & Savings Bank v. Hancock Mutual Life Insurance Co., 970 F.2d at 1144. Thus, such experience could both enhance and secure participants' retirement benefits. Moreover, if insurance companies do not have to comply with ERISA's fiduciary provisions when investing the non-guaranteed "free funds" portion of a group annuity contract, there may be no protection for participants and beneficiaries from insurance companies' breaches of fiduciary duties because state insurance guaranty associations will not protect them. Clearly, this result would frustrate the intent of ERISA to protect the retirement funds of participants and beneficiaries.

ARGUMENT

I. THE DEPARTMENT OF LABOR'S CURRENT INTERPRETATION OF IB 75-2 IS NOT ENTITLED TO DEFERENCE BECAUSE IT IS INCONSISTENT BOTH WITH ERISA'S PURPOSES AND THE DOL'S PREVIOUS INTERPRETATIONS.

For the first time in any litigation concerning non-guaranteed benefits paid from insurance companies' general accounts, the DOL presents a new interpretation of "Interpretive Bulletin Relating to Prohibited Transactions 75-2" (IB 75-2). DOL's new interpretation of IB 75-2 provides that ERISA's general fiduciary rules do not apply to any general account contracts sold by insurance companies which may, at some time in the future, pay fixed annuities because such contracts are not plan assets. The DOL announces that its new position must be given deference for two reasons - - one, it is the agency in charge of interpreting ERISA, and two, its position has remained consistent. *Amicus* Brief of the United States Supporting Petitioner (DOL Brief) at 9-11.

Agency interpretations are entitled to deference only if they are consistent with the statute and if the enforcing agency's position has been consistent over time. Bowen v. Georgetown University Hospital, 488 U.S. at 212-213; United States v. Larionoff, 431 U.S. at 873. See generally Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). In this case, the DOL's position is neither consistent with Congress' purpose in enacting ERISA, nor has it remained consistent over the years.

A. The DOL's Position Is Inconsistent With ERISA's Purpose To Protect Participants And Beneficiaries So That Their Retirement Funds Will Be Secure.

This Court has previously recognized that ERISA's principal purpose is to "make sur[e] that if a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he actually will receive it." Central States Pension Fund v. Central Transport, Inc., 472 U.S. 559, 569 (1985), quoting Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 375 (1980). To ensure that employees receive their benefits, Congress passed ERISA to safeguard employees and retirees from the abuse and mismanagement of those funds which are accumulated to pay retirement benefits. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 15 (1987); Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134-153 n. 8 (1985). In ERISA, Congress enacted elaborate provisions for the regulation of pension plans, including fiduciary standards of care for plan fiduciaries. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 732 (1985). Congress declared ERISA's purpose:

> [to] protect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA § 2, 29 U.S.C. § 1001(b) (emphasis added).

Congress' purpose in enacting ERISA was to protect the retirement security of participants and beneficiaries. The DOL is charged with carrying out that mandate.[3] However, the DOL admits that its current interpretation of IB 75-2, and its later codification at 29 C.F.R. § 2509.75-2, actually reduces protections for participants and beneficiaries. DOL Brief at 17 n.9. By interpreting its bulletin in such a manner, DOL violates ERISA's mandate.[4] Because DOL breached the statutory mandate, its current interpretation of its bulletin is not entitled to deference. United States v. Larionoff, 431 U.S. at 873.

B. The DOL's Current Position Is Inconsistent With Its Previous Interpretations That ERISA Covers Insurance Companies' General Accounts.

The DOL's interpretation is also not entitled to deference because its current position is inconsistent with its previous interpretations. In keeping with ERISA's mandate to protect participants and beneficiaries, the DOL initially recognized that insurance companies' general accounts were covered by ERISA's fiduciary duty rules. The DOL's previous pronouncements contradict its new interpretation of the bulletin as presented in its *amicus* brief.

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[3] ERISA §§ 2, 408, 502(a), 504, & 505, 29 U.S.C. §§ 1001(b), 1108, 1132(a), 1134 & 1135. The Secretary of Labor may take action to enforce ERISA's fiduciary standards, issue prohibited transaction exemptions, conduct investigations, collect civil penalties and prescribe regulations to carry out ERISA's purposes.

[4] The DOL notes that the Second Circuit Court of Appeals' decision provides a more narrow construction of the "guaranteed benefit policy" exclusion. DOL Brief at 12. AARP, LSE, and NELA submit that a narrow construction of the exclusion would better effectuate the broad protections intended by Congress. See generally A.H. Phillips v. Walling, 324 U.S. 490, 493 (1945) ["Any exemption from humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress."]

1. DOL Interpretive Bulletin 75-2 Relates Only to Prohibited Transactions.

The significance of IB 75-2 -- a lone DOL pronouncement regarding application of ERISA's Prohibited Transaction provisions -- to the issue herein can only be understood by appreciating the interrelationship of ERISA's provisions governing fiduciary responsibilities. ERISA § 406, 29 U.S.C. § 1106, sets forth specific transactions which typically entail a high potential for abuse. Donovan v. Cunningham, 716 F.2d 1455, 1464-65 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). Each of the transactions listed in ERISA § 406 is an automatic violation of the statute, regardless of the reasonableness or prudence of the transaction, unless the transaction is exempted by statute or by a prohibited transaction exemption under ERISA § 408, 29 U.S.C. § 1108.

A transaction which violates the prohibited transaction rules under ERISA § 406 automatically violates the general fiduciary rules under ERISA § 404, 29 U.S.C. § 1104. Associates in Adolescent Psychiatry, S.C. v. Home Life Insurance Co., 729 F. Supp. 1162, 1184-85 (N.D. Ill. 1989), aff'd, 941 F.2d 561 (7th Cir. 1991), cert. denied, 112 S.Ct. 1182 (1992) (Associates). See, e.g., Leigh v. Engle, 727 F.2d 113, 123 (7th Cir. 1984) (the per se rules make enforcement of the general fiduciary rules much easier); Davidson v. Cook, 567 F. Supp. 225 (E.D. Va. 1983), aff'd, 734 F.2d 10 (4th Cir. 1984); Marshall v. Mercer, 4 Empl. Ben. Cas. [BNA] 1523, 1533 (N.D. Tex. 1983) (self-dealing is also a breach of prudence). Moreover, even when a transaction is exempted from the prohibited transaction rules, it is not exempt from the fiduciary responsibility rules. See Donovan v. Cunningham, 716 F.2d at 1465. The DOL itself recognizes

this principle.[5] However, a transaction which violates the general fiduciary rules under ERISA § 404 does not automatically violate the prohibited transaction rules. Donovan v. Cunningham, 716 F.2d at 1465; Associates, 729 F. Supp. at 1184-85.

It is thus consistent with this framework that certain assets could be considered plan assets for purposes of ERISA § 404's general fiduciary rules, but not for the prohibited transaction rules of ERISA § 406. Rather than a blanket pronouncement on the scope of the general fiduciary duty provisions of ERISA, IB 75-2, by its title and plain language, is confined to interpreting the scope of the Prohibited Transaction provisions of ERISA § 406.

IB 75-2 reads in relevant part:

> (b) Contracts or policies of insurance. If an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its

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[5] When the DOL issues an individual exemption from the prohibited transaction rules, there is no exemption from the general fiduciary rules. The DOL's typical language is as follows:

> The fact that a transaction is the subject of an exemption granted under section 408(a) of ERISA . . . does not relieve a fiduciary of a plan to which the exemption is applicable from certain other provisions of ERISA, including . . . the general fiduciary responsibility provisions of section 404 of ERISA which, among other things, require a fiduciary to discharge his duties with respect to the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA.

See, e.g., Prohibited Transaction Class Exemption 75-1.

> general asset account, the assets in such account shall not be considered to be plan assets. Therefore, a subsequent transaction involving the general asset account between a party in interest and the insurance company, will not solely because the plan has been issued such a contract or policy of insurance be a prohibited transaction.

29 C.F.R. § 2509.75-2(b) (emphasis added) (orig. publ. Feb. 6, 1975, republished without change to paragraph (b) on Nov. 13, 1986, 51 Fed. Reg. 41262, 41280).

If anything, IB 75-2(b) provides certain contracts with a "safe harbor" from ERISA's prohibited transaction provisions, but not from the statute's central fiduciary responsibility provisions. This reading is consistent with the DOL's own interpretation in its Prohibited Transaction Class Exemptions. Id. This point also was well made in Associates, and the Court of Appeals adopted the reasoning of the Associates court in its decision below. Harris Trust & Savings Bank v. Hancock Mutual Life Insurance Co., 970 F.2d at 1145. In Associates, the court rejected the insurance company's reliance upon IB 75-2(b) as a complete exemption from ERISA:

> It seems perfectly consistent to this Court that plan assets might be considered such for purposes of general fiduciary duties, but not for purposes of the prohibited transactions rules. For example, without the policy stated in the bulletin, independent investment transactions between an insurer and large corporate employers who had purchased the insurer's general account products through a multiemployer plan could be deemed unlawful under § 406 -- even though there would be little, if any, chance that one employer could influence the insurer's

> investment decisions. Nevertheless, it could still be sound statutory policy to subject the insurer to fiduciary duties more generally, while exempting it from the per se conflict-of-interest prohibitions of § 406.

Id. at 1185 (emphasis added; citations omitted).

Moreover, the Associates court's analysis is consistent with the DOL's previous pronouncement on this issue. Discussing the differences between IB 75-2 and its final plan asset regulation, the DOL in 1986 stated that the plan asset regulation was broader because it determined the reach of all of ERISA's fiduciary responsibility requirements, not just the Prohibited Transaction rules. 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986).

2. The "Plan Asset" Regulation.

The long and tortured history of the "Plan Asset" regulation, 29 C.F.R. § 2510.3-101, further reveals that the DOL believed that ERISA's fiduciary responsibility provisions should apply to insurance company general account assets.[6]

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[6] See 29 C.F.R. § 2510.3-101 (final Plan Asset regulation discussed in detail and published at 51 Fed. Reg. 41262 (Nov. 13, 1986)). This regulation resulted from an extremely long and complex regulatory process. The DOL's first proposal was made in 1979. 44 Fed. Reg. 50363 (Aug. 28, 1979) (then proposed as 29 C.F.R. § 2550.401b-1). This was followed by a notice and comment period and hearings. 44 Fed. Reg. 61618 (Oct. 26, 1979); 44 Fed. Reg. 74858 (Dec. 18, 1979); 45 Fed. Reg. 7521 (Feb. 1, 1980). Following this period, the DOL offered a new proposal, the "1980 proposal." 45 Fed. Reg. 38084 (June 6, 1980). The 1980 proposal was also followed by a notice and comment period. In May 1982, the DOL published final regulations dealing only with "guaranteed governmental mortgage pool certificates" and exemptions to the requirements that all plan assets be held in trust. 29 C.F.R. § 2550.403b-1; 47 Fed. Reg. 21241 (May 18, 1982). The DOL promised to deal with the other issues raised by

The proposed Plan Asset regulation was more far-reaching than IB 75-2 because it governed not only prohibited transactions, but also the issues of what constitutes a plan asset and who is a fiduciary under ERISA. 51 Fed. Reg. 41262 (Nov. 13, 1986).

Initially proposed by the DOL in August 1979, the Plan Asset regulation was approved finally on November 13, 1986. The regulation would have given the insurance industry substantial relief. Subsection (d) of the proposed regulation stated:

> Notwithstanding the provisions of subsection (a), in the case of a plan which is funded in whole or in part by a contract or policy of insurance issued by an insurer, the assets of the plan shall include the contract or policy under which the benefits are insured but shall not, solely by reasons [sic] of the issuance of such contract or policy, include the assets of the insurer issuing the contract or policy <u>except to the extent that such assets are maintained by the insurer in one or more separate accounts and do not constitute surplus in any such account</u>.[7]

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its 1980 proposal "in the near future." 47 Fed. Reg. 21241 (May 18, 1982). In January 1985, the DOL officially withdrew the 1979 and 1980 proposals and offered a new proposal. 50 Fed. Reg. 961 (Jan. 8, 1985). A notice and comment period and hearing were held on the 1985 proposal, which was the basis for the final regulation. In April 1986, Congress ordered the DOL to adopt final regulations defining plan assets by December 31, 1986. 29 U.S.C. § 1135(d). On November 13, 1986, the DOL did so. 29 C.F.R. § 2510.3-101 (1986).

[7] 44 Fed. Reg. 50363, 50366 (Aug. 28, 1979) (emphasis added). The original plan asset regulation was proposed as 29 C.F.R. § 2550.401b-1. 44 Fed. Reg. 50363 (Aug. 28, 1979).

The Plan Asset regulation, as finally enacted, does not mention insurance company general accounts or provide a "safe harbor" for such accounts.[8] The DOL in 1985 withdrew the 1979 version of the regulation, and has not promulgated any provision similar to subsection (d).

In early 1985, the DOL received comments from the American Council of Life Insurance (ACLI), a national trade association for the life insurance business, on the DOL's new plan asset proposal. These comments requested that the DOL reinsert an explicit statement that assets held in general accounts pursuant to contracts with ERISA-covered plans are not plan assets and thus managers of such assets are not fiduciaries.[9] The DOL declined to do so. In November 1986, the DOL adopted the final Plan Asset regulation without providing a "safe harbor," or indeed, any "harbor" at all for insurance company general accounts. 29 C.F.R. § 2510.3-101 (1986).

Clearly, the DOL's previous interpretation of IB 75-2 had been that general account assets are not excluded by the guaranteed benefit account exclusion and therefore are covered by the ERISA fiduciary rules. In its *amicus* brief, the DOL takes a position that is completely inconsistent with these previous interpretations. This inconsistency is evident in at least four ways. First, in its request for an extension of time to file an *amicus* brief requested by the Second Circuit in this case, the DOL stated that it "had not formulated a final position on the issue." <u>Harris Trust & Savings Bank v. Hancock Mutual Life Insurance Co.</u>, 970 F.2d at 1140.

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[8] 29 C.F.R. § 2510.3-101 (1986). The final regulation merely states that IB 75-2(b) is unaffected by the regulation. <u>See also</u> 29 C.F.R. § 2509.75-2 (1986).

[9] Letter of Steven W. Kraus, ACLI Associate General Counsel, to DOL Office of Regulations and Interpretation, Office of Pension and Welfare Benefit Programs, dated March 19, 1985, with enclosure. <u>Amicus</u> App. at 1-17.

Second, when the DOL finally responded to the Second Circuit, it stated that:

> the need to fully consider all of the implications of these issues within the Department precludes our providing the court with a brief within a foreseeable time frame.

Id. at 1141.

Third, IB 75-2, by its title and plain language, only concerns prohibited transactions, and has no bearing on general fiduciary responsibilities, which remains consistent with previous DOL interpretations. Fourth, in its *amicus* brief, the DOL never discusses the plan asset regulation - the regulation which provides guidance on the determination of a plan asset. In the plan asset regulation, the DOL stated that the plan asset regulation was broader than IB 75-2 because it determined the reach of all of ERISA's fiduciary responsibility requirements, not just the Prohibited Transaction rules. 51 Fed. Reg. 41262 (No. 219) (Nov. 13, 1986). Moreover, the history of the plan asset regulation indicates that the DOL rejected an exclusion of insurance company general accounts from ERISA's fiduciary rules and a "safe harbor" for such accounts. See pp. 11-13, supra.

It is only with the *amicus* brief in this case that the DOL takes a new and different position on IB 75-2. Clearly, if the DOL's position concerning the interpretation of this bulletin had remained consistent throughout the past eighteen years, there would have been no reason not to put forth its position sooner. Because of this inconsistency, the DOL's position is not entitled to deference.

II. PARTICIPANTS AND BENEFICIARIES BENEFIT FROM POSITIVE INVESTMENT EXPERIENCE IN A DEFINED BENEFIT PLAN.

The Court of Appeals found that "investment performance clearly does affect the amount of funds available to the plan and its participants." Harris Trust & Savings Bank v. Hancock Mutual Life Insurance Co., 970 F.2d at 1144. In contrast, the district court reasoned that the fluctuation resulting from Hancock's investment experience was irrelevant to the plan's participants and beneficiaries because "covered employees receive a fixed amount determinable by reference to the terms of the plan and not by investment performance." Harris Trust & Savings v. John Hancock Mutual Life Insurance, 722 F. Supp. 998, 1016 (S.D.N.Y. 1989). Accord, Mack Boring and Parts v. Meeker Sharkey Moffitt, 930 F.2d 267, 272-73 (3d Cir. 1991).

The district court below apparently believed that if an employer has a defined benefit plan,[10] the employees' benefits are fixed and secured (paid either by the employer or the insurer) and the success or failure of the plan's investments is of no significance to the plan's beneficiaries. In essence, this analysis leads to the conclusion that ERISA's fiduciary rules should not apply to defined benefit plans. This conclusion not only lacks any support in the record, but is wrong for two reasons. First, positive investment experience can enhance a retiree's retirement benefits. Second, positive investment experience can secure a retiree's retirement benefits.

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[10] A defined benefit plan promises a participant a specific amount of pension benefits at retirement determined under a formula based on years of participation in the plan, and in most nonbargained plans, based on an average of compensation. C.I.R. v. Keystone Consolidated Industries, Inc., 113 S. Ct. 2006 (1993). See generally S. Bruce, Pension Claims: Rights and Obligations 17-18 (1988).

A. Positive Investment Experience Can Enhance Retirement Benefits.

Beneficiaries of defined benefit plans depend upon positive investment experience to enhance their benefits in two ways. Enhancement of benefits can occur through either an increase in the absolute amount of benefits or through ad hoc post-retirement increases.

If a pension plan has obtained positive investment returns over a number of years, the plan trustees can choose to make benefits more generous for all participants and beneficiaries, thus providing more retirement income. Usually benefits are increased by a change in the benefit formula such as increasing the percentage of average compensation used in calculating the benefit amounts.

Enhancement of benefits after retirement is also important to participants and beneficiaries because "inflation can severely erode the purchasing power of a fixed pension throughout a worker's retirement years."[11] S. Allen, R. Clark, & A. McDermed, "Post-Retirement Benefits Increases in the 1980s," Trends in Pensions 1992 319 (U.S. Department of Labor, Pension and Welfare Benefits Administration, 1992) [hereinafter "Trends in Pensions"].

In order for plan trustees to be in a position to enhance benefits, plan assets need to increase. Obviously, plan assets will grow the better investments perform. The

[11] At an annual inflation rate of five percent, the purchasing power of a $5,000 annual pension will decrease to approximately $1,900 in twenty years. S. Wachter, Inflation and Pensions 190, Table 5-6, 261 & 365 (1987). See also "Defined Benefit Pension Plans", Employee Benefits in Medium and Large Firms, 1991, 79, 84 (U.S. Department of Labor, Bureau of Labor Statistics, 1993); "Defined Benefit Pension and Defined Contribution Plans", Employee Benefits in Small Private Establishments, 1990, 69, 72 (U.S. Department of Labor, Bureau of Labor Statistics, 1991).

greater the amount of plan assets, the more likely a plan will grant post-retirement increases to participants and beneficiaries, either through an ad hoc adjustment to the annuity amount or a lump sum payment. Trends in Pensions at 331, Table 13.2; "Defined Benefit Pension Plans," Employee Benefits in Medium and Large Firms, 1991, 79, 84 (U.S. Department of Labor, Bureau of Labor Statistics, 1993).

The likelihood of a post-retirement increase and the generosity of the amount of the increase, if granted, correlate to the plan's funding arrangements and rates of return. A study has shown that plans funded wholly through insurance companies were less likely to grant post-retirement increases than plans funded solely through a trust fund.[12] Trends in Pensions at 325, 328 & 334. Significantly, participants received larger post-retirement increases from better funded plans than from under-funded plans and from plans with higher rates of return than from plans with lower rates of return. Id. at 328.

B. Positive Investment Experience Can Secure Retirement Benefits.

Beneficiaries of defined benefit plans also depend upon positive investment experience to secure their benefits. For example, the poor performance of an insurance company caused the reduction of benefits to participants and beneficiaries, according to unrebutted evidence in Mack Boring and Parts v. Meeker Sharkey Moffitt, 930 F.2d at 269-70.

Moreover, just because an employee participates in a defined benefit plan, the employee's benefits are not

[12] Most benefit increases were discretionary, or ad hoc, rather than automatic cost of living adjustments. Employee Benefits in Medium and Large Firms, 1991 at 84 & 99, Tables 96 & 97; Employee Benefits in Small Private Establishments, 1990 at 72 & 79, Table 77.

necessarily secure if a plan is terminated. If the Pension Benefit Guaranty Corporation (PBGC) assumes operation of a terminated plan,[13] a participant may lose some or all of his retirement benefits.[14] Even the PBGC guarantee of a reduced benefit may not be secure because government studies suggest that the PBGC may have serious long-term funding shortfalls due to potential liability from underfunded plans. Underfunded plans place participants at risk of losing benefits.

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[13] An employer may terminate the pension plan by demonstrating that it will enter into bankruptcy if the plan is not terminated or by demonstrating that its pension costs are unreasonably burdensome because of a decline in the number of employees covered by the plan. ERISA § 4041(c)(2)(B), 29 U.S.C. § 1341(c)(2)(B). The PBGC may terminate the plan for four reasons: (1) the plan has not met ERISA's minimum funding standards; (2) the plan is unable to pay benefits when due; (3) the plan has made a distribution of $10,000 or more to a substantial owner; or (4) PBGC will suffer an unreasonable long-run loss if the plan is not terminated. ERISA § 4042, 29 U.S.C. § 1342. The PBGC does not guarantee defined contribution plans. 29 U.S.C. §§ 1301(a)(15) & 1322.

[14] First, the PBGC only guarantees a participant's benefits up to a specified amount. In 1993, the maximum guaranteed amount is $29,250 per year for a participant who retires at age 65. ERISA § 4022(b)(7), 29 U.S.C. § 1322(b)(7); 29 C.F.R. § 2621.3. Second, the PBGC will only guarantee certain benefits and will pay benefits only in certain forms. Examples of benefits which the PBGC will not guarantee are pension benefit increases in effect less than five years before termination, retiree health benefits, death benefits, disability benefits and vacation pay. ERISA §§ 4022(a), 4002(a)(2), & 4001(a)(8), 29 U.S.C. §§ 1322(a), 1302(a), 1301(a)(8); 29 C.F.R. §§ 2613.7(a), 2613.4(a)(2)(i) & (c)(1), & 2613.5(a)(2) & (3). The PBGC will not pay benefits in a lump sum form, even if the plan specifically permits such a benefit option, unless it is under the amount of $3,500. 29 C.F.R. § 2613.7(b)(1). <u>See also</u> Testimony of Joseph F. Delfico, <u>Improving the Financial Condition of the Pension Benefit Guaranty Corporation</u>, (GAO/T-HRD-92-60, Sept. 25, 1992). Third, although nonvested benefits are required to become nonforfeitable, they are nonforfeitable only "to the extent funded." ERISA § 4022(a), 29 U.S.C. 1322(a); I.R.C. § 411(d)(3).

Clearly, improved funding of underfunded pension plans through increased contributions and better investment return is beneficial to participants.[15]

III. STATE INSURANCE LAWS DO NOT PROTECT RETIREES' BENEFITS.

Without ERISA's protection, retirees would have to rely on state insurance laws. However, retirees may lose benefits when an insurance company becomes insolvent because state guaranty associations do not protect group annuity contracts from insurance companies' breaches of fiduciary duties.

Should a pension plan invest in an insurance company, the insurance company become insolvent and the plan incur losses, such investment losses normally would not be covered by state guaranty associations. Significantly, unallocated funding instruments such as Group Deposit Administration contracts and Immediate Participation Guarantee annuity contracts -- the types of contracts at issue here -- are generally not covered by state guaranty associations.[16] If a defined contribution plan invests in an unallocated funding instrument,

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[15] PBGC's deficit as of the end of fiscal 1991 was approximately $2.3 billion, and its potential deficit may grow to $17.9 billion by the year 2001 in the worst case scenario. <u>See e.g.</u>, <u>Hidden Liabilities Increase Claims Against Government Insurance Program</u>, (GAO/T-HRD-93-0, Dec. 30, 1992); <u>Improving the Financial Condition of the Pension Benefit Guaranty Corporation</u>, (GAO/T-HRD-92-60, Sept. 25, 1992); <u>Financial Condition of the Pension Benefit Guaranty Corporation</u>, (GAO/T-HRD-92-52, Aug. 11, 1992).

[16] Fifteen states and the District of Columbia specifically do not cover unallocated funding instruments; nineteen states specifically cover such instruments; and sixteen states do not specify whether such instruments are covered by the state guaranty associations. <u>Protections for Retirees' Insurance Annuities Can Be Strengthened</u> at 17 (GAO/T-HRD-93-28, Mar. 31, 1993).

the participant directly bears any capital loss; if a defined benefit plan invests in this same instrument, the plan bears the loss. But, as noted by the GAO,

> [o]ne implication of the lack of state guarantee is that maintaining funding levels may put excessive financial pressures on the plan sponsor. This could push some companies towards bankruptcy, increasing plan terminations and thus PBGC's liabilities.

Testimony of Joseph F. Delfico, Insurance Company Failures Threaten Retirement Income at 14 (GAO/T-HRD-91-41, Jun. 27, 1991).

For the group annuity contract at issue in this case, the state guaranty associations generally would not provide protections for any losses. If this contract is also exempt from ERISA's coverage by virtue of the guaranteed benefit policy exclusion, there would be no protection at all, thereby frustrating ERISA's purpose to protect participants and beneficiaries so that their retirement funds will be secure.

Retirees may lose retirement benefits even where the state guaranty associations supposedly provide protections. Three GAO reports document the lack of protection for retirees whose benefits are paid by insurance companies in case of insurance company failures. Testimony of Joseph F. Delfico, Insurance Company Failures Threaten Retirement Income, (GAO/T-HRD-91-41, Jun. 27, 1991); Millions of Workers Lose Federal Benefit Protection at Retirement, (GAO/T-HRD-91-79, Apr. 25, 1991); Protections for Retirees' Insurance Annuities Can Be Strengthened, (GAO/T-HRD-93-28, Mar. 31, 1993) [hereinafter Protections]. Lack of protections include failure to cover retirees if they are not state residents, failure to cover retirees if the insurance company did not meet state licensing requirements, and failure to guarantee the total amount of the annuity. Protections at 4, 24-29.

If the intent of Congress was to exclude all insurance products from ERISA's reach, Congress would easily have done so. But it did not. Instead, Congress sought to protect participants and beneficiaries, even those whose retirement funds are invested in insurance products, so that their retirement funds would be secure. Toward this end, Congress designed ERISA to require the persons handling the investments that support such benefits to adhere to fiduciary standards so that plans will be properly and adequately funded. Consequently, consistent with the purposes of ERISA to protect participants and beneficiaries, the nonguaranteed "free funds" portion of the group annuity contract should be subject to ERISA's fiduciary rules.

CONCLUSION

For the foregoing reasons, AARP, Legal Services for the Elderly, and NELA respectfully ask the Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

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July 1993

APPENDIX

March 19, 1985

Office of Regulations and Interpretation
Office of Pension and Welfare Benefit Programs
Room C-4526
U.S. Department of Labor
Washington, D.C. 20210
Attn: Proposed Plan Assets Regulations

RE: Department of Labor Proposed Regulation Relating to the Definition of Plan Assets, as published at 50 Fed. Reg. 961 (January 8, 1985).

Dear Sir:

The following comments on the Proposed Regulation noted above are offered on behalf of the American Council of Life Insurance ("ACLI" or "Council"). The ACLI is a trade association representing 615 life insurance companies which, in the aggregate, account for approximately 95% of the life insurance in force in the United States, and hold 97% of the assets of insured pension business.

As discussed in detail below, we believe the Proposed Regulation needs to be revised in several important respects. Because of the importance of these issues to our business we request an opportunity to expand on our remarks at the public

hearings to be held on May 6 and (if necessary) May 7, 1985. Our detailed comments on the Proposed Regulation are set forth below.

1. APPLICATION OF PROPOSED REGULATION TO LIFE INSURANCE COMPANY GENERAL ACCOUNT ASSETS

In contrast to the earlier efforts of the Department of Labor ("the Department"), the newly Proposed plan asset Regulation and the accompanying release does not explicitly address the statutory exemption provided under ERISA Section 401(b)(2) for the underlying assets held in a life insurance company's general account. As the Council has indicated in prior submissions to the Department on this subject, uncertainty concerning the status of general account assets for purposes of ERISA materially and adversely affects the insurance industry's management and investment of billions of dollars of assets and the anticipated operation of hundreds of thousands of contracts to the detriment of the industry, its policyholders (which include employee benefit plans and participants), shareholders and third parties that look to insurance company general accounts as a

source of investment or operating funds for their businesses.1/ Therefore, the Council urges the Department to modify the Proposed plan asset Regulation to explicitly provide that general account assets are not "plan assets".

Discussion

Since ERISA's enactment, the life insurance industry has conducted its business on the basis of a common understanding that its general account assets are not "plan assets" under ERISA and that, consequently, it is not subject to ERISA's fiduciary responsibility and prohibited transaction provisions in managing such assets.

As discussed below, there have been two primary sources of support for this understanding:

(1) Section 401(b)(2) of ERISA and the legislative history thereof; and

(2) Consistent Department of Labor administrative inter-pretations.

1/ For a description of these problems, see pages 4-7 and 28-32 of the letter dated March 21, 1984 filed with the Department by the Council.

Section 401(b)(2) and Legislative History.

Section 401(b)(2) of ERISA provides that –

> in the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of the insurer.

As the Council has detailed in previous submissions to the Department, the legislative history underlying this provision reflects a clear intent by Congress to exclude from "plan asset" treatment funds held by a life insurance company, other than in a separate account. Furthermore, Congress would have specifically provided that general account assets are to be treated as "plan assets", had it intended to regulate the operating accounts of insurance companies.2/

2/ See pages 16-23 of the letter dated March 21, 1984 filed with the Department of Labor by the Council. The Department has previously recognized that congress did not intend to treat general account assets as "plan assets". Oversight on ERISA: Testimony of Paul J. Fasser, Jr., Assistant Secretary of Labor, hearings on (continued...)

Consistent Administrative Interpretations

The industry's understanding that general account assets are not "plan assets" has been supported by the Department's general interpretation of ERISA as it applies to the assets of an operating business in which an employee benefit plan might have an interest. Shortly after ERISA's enactment, representatives of the life insurance industry requested that the Department and the IRS issue interpretive rulings to resolve any ambiguity in Section 401(b)(2). This interpretive request included descriptions of various types of pension contracts (e.g., deferred annuity contracts, deposit administration contracts and immediate participation guarantee contracts) under which contractholder payments are allocated to an insurer's general account.

In response, and as one of their first major pronouncements under ERISA, the Labor Department and the IRS promulgated IB 75-2 (February 6, 1975) and Technical

2/(...continued)
Public Law 93-460 before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. 390-91 (1975).

Information Release 1346 (February 6, 1975) ("TIR 1346"). In particular, IB 75-2 provides that –

> if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in this general asset account, the assets in such account shall not be considered to be plan assets.

IB 75-2 and TIR 1346 did not purport to amplify the meaning of "guaranteed benefit policy." Rather, they discuss an employee benefit plan's interest in a contract, the consideration for which is placed in an insurer's general account, as one example of the circumstances under which the underlying assets of an operating business do not by virtue of such interest become "plan assets". The Department has subsequently reiterated the interpretation set forth in IB 75-2 on a number of occasions, including its earlier, proposed version of the "plan asset" regulations.3/

3/ See 44 Fed. Reg. 50363, 50364 n.4 (Aug. 28, 1979). Prohibited Transaction Exemption 79-41, 44 Fed. Reg. 46365, 46368 (Aug. 7, 1979); 46 Fed. Reg. 46443, 46444 (Sept. 18, 1981).

Therefore, the Department of Labor has consistently and explicitly taken the position that when an insurance company issues a contract to fund an employee benefit plan, and considerations paid under the contract are placed in the insurance company's general account, the general account assets do not as a result become "plan assets" for purposes of ERISA. Such position is entirely consistent with the legislative history of ERISA, the policy underlying that statute and the Department's general approach in seeking to define what are "plan assets." In the ten years since ERISA's enactment, neither the Department nor the IRS has taken any enforcement or other action inconsistent with this interpretation.

The Need for Explicit Regulatory Relief for General Account Contracts.

The industry's reliance on the common understanding of what constitutes plan assets has recently been called into question by the decision of the Seventh Circuit Court of Appeals in Peoria Union Stockyards Company Retirement Plan v. The Penn Mutual Life Insurance Company, 698 F.2d. 320 (7th Cir. 1983).

That case held that a general account deposit administration group annuity contract was not a "guaranteed benefit policy" within the meaning of Section 401(b)(2). It is important to note that the Depart-ment's general interpretation of the term "plan assets" and its particular application of that interpretation to general account assets was not brought to the attention of the Court in Peoria, and the Court's analysis of the defendant insurer's status as a fiduciary did not go beyond an interpretation of the language of the Section 401(b)(2) exclusion. If no other authority addresses the issue of what constitutes "plan assets", it is possible that the Peoria Court's analysis of the Section 401(b)(2) exclusion could be followed and funds held by an insurer in its general account construed to be "plan assets".

For the reasons set forth in the Council's letter to the Department dated March 21, 1984, the Council believes that the holding in Peoria is inconsistent with both the legislative history and legislative policy underlying Section 401(b)(2) -- namely, that contracts issued by an insurance company's general account do not cause the underlying general account assets to be regarded

as "plan assets" -- and that Peoria's general application would materially and adversely affect the life insurance industry's investment and management of its general account in a fashion clearly not intended by Congress. Further, we believe that the Peoria Court's holding resulted largely from the ambiguity of the term "guaranteed benefit policy," and that ultimately legislation is essential to definitively correct the problem.

Pending such legislative clarification of Section 401(b)(2), it becomes particularly important for the Department to explicitly and unambiguously reaffirm its position that the general account assets of an insurer should not be regarded as "plan assets." The rationale is similar to that which supports the conclusion that the assets of other business corporations in which a plan may invest or with which a plan may contract are not "plan assets."

Insurance Companies Should be Treated Consistently With Operating Companies

While the Department has refined its general approach to defining "plan assets" since the release of IB 75-2, the basic

principles underlying that general approach have not changed and continue to support the position that general account assets are not "plan assets". Under the current Proposed plan asset Regula-tion, the Department continues to take the position that the significance and nature of the interests of employee benefit plans in the profits and investment results of an entity are not necessarily determinative of the status of the entity's assets as "plan assets" for purposes of ERISA.

Thus, the Proposed plan asset Regulation specifically excludes from "plan asset" treatment the assets of operating companies (including but not limited to, venture capital and real estate operating companies) without reference to the nature or significance of employee benefit plan participation in the profits or losses derived from those companies' assets. The rationale underlying the exclusion of the assets of such companies from "plan asset" treatment is that it is neither practical nor appropriate to require an operating company to manage its assets solely in the interests of and for the exclusive purpose of providing benefits to employee benefit plans which invest in or

contract with the company. The fact that some obligations under particular general account contracts are related to or affected by the return derived from general account investments does not affect the characterization of a general account as an operating business and the conclusion that general account assets are not "plan assets".

The same premise -- that it is neither practical nor appropriate to require an operating business to manage its assets solely in the interest of and for the exclusive purpose of providing benefits to employee benefit plans which invest therein -- is equally applicable to the general account of a life insurance company.

As the Council has demonstrated in previous submissions to the Department, a life insurance company general account is most properly characterized as the assets and liabilities of an operating business which primarily involves the assumption and management of risks and other obligations in return for consideration. While the investment of capital is a significant function in connection with the management of the insurance

business, it is neither an autonomous function nor a life insurance company's primary function. Rather, the investment of its general account funds is one of many functions which a life insurance company undertakes in supporting and managing its obligations to its life insurance, health insurance and annuity contractholders as well as other parties with whom the company has a business relationship.

Recommendation

The Department should provide clear-cut relief from plan asset status for the general accounts of insurance companies, as this is what was intended by the Congress in enacting the Section 401(b)(2) exemption for "guaranteed benefit policies." Because of Peoria, we believe it is imperative that this issue be addressed explicitly in the final regulation.

The Department thought it important to provide express "plan asset" relief to registered investment companies, venture capital operating companies and real estate operating companies.

In our view it is as important to grant explicit regulatory relief to life insurance company general account assets.4/

Therefore, the Council specifically recommends that the Proposed plan asset Regulation be modified by amending paragraph 2510.3-101(a)(2) to read as follows:

> (2) Generally, when a plan invests in another entity, its assets include its investment, but do not, solely by reason of such investment, include any of underlying assets of the entity. However, when a plan acquires an equity interest in an entity that is (nei-ther) not a publicly-offered security, (nor) not a security issued by an investment company registered under the Investment Company Act of 1940 nor an interest arising out of a contract issued by an insurance company licensed to do business in a state, other than an interest subject to paragraph (f), its assets include both the equity interest and an undivided

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4/ If the Department, contrary to the Council's request, decides not to explicitly provide that general account assets are not "plan assets," the Council strongly urges the Department to make clear that until this issue is dealt with in regulations, IB 75-2 remains in effect insofar as it applies to the status of general account assets. To do otherwise will create a regulatory vacuum on this issue which would exacerbate the uncertainty concerning the status of general account assets to the material detriment of the insurance industry, its policyholders (including employee benefit plans and participants), shareholders and third parties that look to insurance company general accounts as a source of funds for their businesses.

interest in each of the underlying assets of the entity, unless it is established that –

The Council believes this recommendation is consistent with the general principles underlying the Proposed Regulation and protective of the interests of employee benefit plans as it covers only the status of insurance company entities.

2. THE EFFECTIVE DATE AND TRANSITIONAL RULES IN PREAMBLE SECTION (H) AND REGULATION SECTIONS 2510.3-101(i)

If adopted, the Proposed Regulation would be effective for purposes of identifying "plan assets" at any time on or after ninety days from the date of publication as a final regulation. In addition, the proposal (as amended by the Department on February 15, 1985) provides a transitional rule that the regulation would not apply to plan investments in an entity that is in existence on June 30, 1986, if no employee benefit plan subject to Title I of ERISA or non-excluded plan described in Section 4975(e)(1) of the Internal Revenue Code of 1954 acquires an interest in the entity from an issuer or an underwriter at any time after June 30, 1986, except pursuant to a binding contract in effect on that date.

We are pleased that the Department has amended the Proposed Regulation to address the potential retroactivity problem present under prior Proposed Regulation Section 2510.3-101(i). We suggest, further, that if final regulations are not published 90 days prior to the June 30, 1986 date now specified in the Proposed Regulation, that this date be extended until 90 days after final regulations are in fact published. Prior to that point, IB 75-2 should be continued (see footnote four on page 10). In this way investment managers will only be subject to two consecutive standards and the situation where investment decisions must be made without knowledge of the applicable legal guidelines will never arise.

3. STATUS OF SEPARATE ACCOUNTS

Proposed Regulation Section 2510.3-101(f) sets forth certain situations under which interests acquired by a plan in a separate account do not constitute "plan assets". We believe that a provision should be added to this section to provide that if a separate account would qualify as: (1) a venture capital operating company; (2) a real estate operating company; or (3) otherwise

qualify for exclusion from "plan asset" status, then the underlying assets of the separate account do not constitute "plan assets".

As noted in the prior discussion of insurance company general accounts, the Proposed Regulation explicitly excludes from plan asset treatment the assets of venture capital or real estate operating companies without reference to the nature or significance of employee benefit plan participation in the profits or losses derived from those companies' assets. If an insurance company's separate account qualifies in all other respects as either a venture capital operating company or a real estate operating company, equity argues that the insurance company separate account should be treated in the same fashion as those operating companies.

We believe, further, that it would be helpful to add an example to the Proposed Regulation to illustrate one circumstance under which pooled separate account assets would not be "plan assets". Such an example follows:

> S is a pooled separate account maintained by I, an insurance company. There is

> significant participation in S by plan investors, including more than one employee benefit plan investor. More than 85 percent of the fair market value of the assets of S consist of real estate investments with respect to which S has the right to participate in, or influence, the management of the real estate. Although S has no employees, all such rights are in fact exercised by I acting on behalf of S. Under these facts, S is a "real estate operating company".

4. <u>EXAMPLES UNDER SECTION 2510.3-101(h)</u>

Example 13 under Section 2510.3-101(h) is both ambiguous and, in our view, incomplete. This example is designed to illustrate what is meant by the term "real estate operating company". It states:

> X maintains a staff of employees who preform (sic) management and development services, but X also retains independent contractors to perform some tasks. Under these facts, X is a real estate operating company.

As currently stated, this example may be misconstrued to mean that in order for an entity to be treated as an operating company its own employees must perform the management and development services. Typically, properties are managed and

developed through partnerships or corporations which are responsible for management and development but utilize employees of a general partner or its affiliates or retain independent contractors to perform those functions. However, as the partnership or corporation is responsible for those functions, it is no less a "real estate operating company" than if it hired employees to perform those services. In many cases, it is less costly to perform those services through a general partner or independent contractor than through employees of the entity owning the property.

Therefore, we strongly urge the Department to add an additional example to read as follows:

> X is a partnership in which there is significant equity participation by employee benefit plans. More than 85 percent of the fair market value of the assets of X consists of commercial real estate properties which X has acquired. X, which does not have its own employees, has retained I, an independent contractor, to perform property management functions on behalf of X with respect to X's properties. X retains significant rights with respect to X's properties including the approval of the acquisition or sale of properties, the approval of leasing guidelines and of substantial leases of space in the properties, and the approval of capital expenditures and other significant expenditures with respect to the properties. Under these facts, X is a real estate operating company.

In addition, as currently drafted, the statement in Example 13 of the percentage of assets that must be devoted to management and development activities is ambiguous. Under the example, more than 85% of the fair market value of the entity's assets must be devoted to management and development activities. We assume that the intent of the drafters was to require the entity to manage or develop a stated percentage of assets, not to require that a certain percentage of the entity's assets be devoted to management and development. We therefore, suggest that this language be redrafted as follows:

> On its most recent valuation, X managed or developed assets comprising more than 85% of the fair market value of its assets.

A comparable change should be made to Proposed Regulation Section 2510.3-101(c)(3).

5. NEED FOR CLEAR GUIDANCE ON DIFFERENCE BETWEEN EQUITY AND DEBT INTEREST

Under Section 2510.3-101(a) of the Proposed Regulation, if a plan acquires a significant "equity interest" in an entity (other than a security issued by a registered investment company, a publicly-offered security or an interest in an operating company), the assets of the plan will include an undivided interest in the assets of the entity in which the plan invests. On the other hand, if a plan acquires a debt instrument, the underlying assets of the entity issuing the debt instrument will not be deemed to be plan assets.

Because the distinction between debt and equity can determine whether the underlying assets of an entity are deemed to be plan assets, the definition of an "equity interest" is of critical importance to plans and the entities in which they invest. The definition contained in the Proposed Regulation does not, however, provide a clear guideline for determining whether an interest is debt or equity, particularly in the context of certain types of real estate investments. Without such guidance, the "plan assets" status of many investments under ERISA will be

unclear and the managers of such investments will be uncertain as to whether and to what extent they must comply with ERISA. Accordingly, because plans, especially plans investing in real estate, need clear guidance as to the "plan assets" treatment of investments, we urge that the proposed Regulation be modified to provide a clear safe harbor from "equity interest" treatment.

We understand that the law firm of Groom and Nordberg is filing detailed comments on this issue on behalf of several individual companies. The ACLI endorses those comments and refers the Department to them for a more thorough discussion of this issue.

6. STATUS OF EMPLOYEE CONTRIBUTIONS

The preamble to the Proposed Regulation states that:

> The Department is separately considering what action to take with respect to the portion of the 1979 proposal that relates to employee contributions.

We assume that the Department plans to take further action with regard to rules on employee contributions and does not anticipate receiving comments on such contributions in connection with the Proposed Regulation. The ACLI does wish, however, to advise

the Department that our position with regard to the status of employee contributions remains as stated in our memorandum on this topic dated November 16, 1979.

(15)

No. 92-1074

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.
Petitioner,
v.

HARRIS TRUST AND SAVINGS BANK,
As Trustee of the Sperry Master Retirement Trust No. 2,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE FOR CERTAIN UNITED STATES SENATORS AND REPRESENTATIVES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether petitioner John Hancock Mutual Life Insurance Company ("Hancock") is a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"), with respect to the portion of the assets it holds pursuant to Group Annuity Contract No. 50 which are not associated with guaranteed benefits.

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INTEREST OF AMICI

This case raises an important issue concerning the interpretation of ERISA § 401(b)(2) and, therefore, the scope of ERISA's fiduciary rules as they apply to insurance company control of pension plan assets. Amici are United States Senators and Representatives, including the chairman of the Subcommittee on Labor, Committee on Labor and Human Resources, United States Senate, and the chairman of the Subcommittee on Labor-Management Relations, Committee on Education and Labor, United States House of Representatives (both of which have jurisdiction over ERISA), who are especially concerned about the need to protect and secure pensions for Amer-

ica's workers and retirees. Amici believe that the position taken by the United States inaccurately interprets Congressional intent as well as the language of ERISA and leaves workers and retirees inadequately protected by federal and state law.

SUMMARY OF ARGUMENT

A. The Second Circuit's opinion correctly interprets the plain language of ERISA § 401(b)(2). ERISA is an expansive remedial statute, and exemptions such as that contained in ERISA § 401 must be strictly and narrowly construed.

B. Contrary to the arguments made by Hancock and the United States, the legislative history and intent of ERISA support the Second Circuit's reading of the statute. The Congress intended a narrow, precise exemption.

C. The Department of Labor's Interpretive Bulletin 75-2 cannot be read to interpret ERISA § 401(b)(2). On its face, IB 75-2 relates to prohibited transactions and not ERISA's fiduciary duty provisions. Read as the United States suggests, IB 75-2 contradicts ERISA § 401(b)(2) and cannot stand.

D. The overriding purpose of ERISA, protection of workers' and retirees' pension benefits, would be undermined by the court-created exemption sought by Hancock and would leave tens of millions of workers and retirees at risk. The recent spate of insurance company failures, such as Executive Life Insurance and Mutual Benefit Life, demonstrates the need for fiduciary responsibility by insurance companies whenever they act as pension fund investment managers. Hancock and the insurance industry's claim that these contracts cannot be designed to comply with ERISA is untrue. In similar cases, when risk to pension plan policy holders has arisen, the insurance industry has restructured similar contracts to provide adequate protection to pension plans.

ARGUMENT

I. THE DECISION BELOW CORRECTLY INTERPRETS ERISA § 401(b)(2) AS A LIMITED EXCEPTION TO ERISA'S FIDUCIARY RULES, NOT THE BROAD EXEMPTION THE INSURANCE INDUSTRY ASKS THIS COURT TO CREATE

A. ERISA § 401(b)(2) Is Narrow And Precise; It Should be Strictly Construed By The Courts

ERISA is a broad remedial statute designed to secure pension assets for the eventual payment of pension benefits to America's workers, retirees and their beneficiaries. ERISA § 2. To the extent any person exercises authority or control over pension "plan assets," he or she is a fiduciary, bound by ERISA's strict fiduciary responsibility requirements. The fiduciary responsibility rules are the cornerstone of ERISA: pension plan assets must be prudently managed and invested in order to ensure the future payment of promised retirement benefits. ERISA §§ 3(21), 404, and 406. Contrary to Hancock's assertion, both the language of the statute and the intent of ERISA as a whole, make clear that exceptions to the fiduciary responsibility requirements should be read narrowly.

Although ERISA contains no definition of "plan assets," ERISA § 401(b) contains two narrow exceptions from the term for: 1) plan investments in registered investment company securities and 2) insurance company "guaranteed benefit policies." ERISA defines a "guaranteed benefit policy" as:

> an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

ERISA § 401(b)(2)(B). Thus, an insurance company that has discretionary control over assets invested by a

pension plan pursuant to a "guaranteed benefit policy" in which the insurer has guaranteed to provide fixed retirement benefits, is not an ERISA fiduciary as to the funds used to purchase those guaranteed benefits. Conversely, an insurer that has discretionary control over assets for which there is no retirement guarantee, is a fiduciary under ERISA. This limited exception makes practical sense; the fiduciary responsibility rules should apply unless the insurer has agreed to provide comparable retirement protection to workers and retirees under all circumstances, including poor investment performance.

The Second Circuit Court of Appeals adopted this common-sense interpretation of the plain language of the statute, holding that Hancock was only exempt from ERISA's fiduciary rules "to the extent" it manages pension assets supporting retirement benefits guaranteed by the insurer. To the extent Hancock has discretionary control over pension monies which do not support benefits guaranteed by the insurer, the assets are "plan assets" and Hancock is an ERISA fiduciary. *Harris Trust & Savings Bank v. John Hancock Mutual Life Ins. Co.*, 970 F.2d 1138 (2d Cir. 1992); *see also Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983).

It is settled that when a court interprets an exemption or exception to remedial legislation, the exemption must be narrowly and strictly construed. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 n.33 (1981). Following this well-settled rule and resorting to the "plain language" of the statute, the Second Circuit correctly rejected the holdings of the district court and the Third Circuit. *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt, Actuarial Consultants,* 930 F.2d 267 (3rd Cir. 1991); *Harris Trust & Savings Bank v. John Hancock Mutual Life Ins. Co.*, 722 F. Supp. 998, 1011-20 (S.D. N.Y. 1989) (*"Harris I"*).

Nevertheless, Hancock, the insurance industry, the states of New York and Massachusetts, and the United States ask this Court to interpret ERISA § 401(b)(2)(B) so as to immunize all pension plan investments in insurance company general account products because, under state law, all general account contracts give policyholders the "option" to purchase guaranteed benefits even though potentially at draconian below market purchase rates. These purchase provisions transfer no risk to the insurer because the insurer does not guarantee the price of annuities in advance nor the amount of money that will be required to purchase such benefits in the future. The investment risk remains entirely with the pension plan.

Congress rejected a broad exemption for all guaranteed benefit policies. A blanket exemption for all general account contracts had been part of the Senate version of the draft legislation, but was *deleted* in Conference Committee and does not appear in the law as enacted by Congress and signed by the President. *Compare* S.4, 93d Cong., 1st Sess. §§ 501(17)(B), 510 (1973), *reprinted in* 1 Legislative History of ERISA at 147, 170 (Comm. Print 1976), *with* ERISA § 401(b)(2)(B).[1] "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be *presumed that the limitation was not intended.*" *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (emphasis added).

We believe that Judge Posner correctly concluded in 1983 that:

> The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to [the insurance company] to manage with full investment discretion, subject only to a modest income guaranty. If the pension plan

[1] The Senate version of ERISA provided that the fiduciary provisions would not apply to "funds held by an insurance carrier unless that carrier hold funds in a separate account."

> had hired an investment advisor and given him authority to buy and sell securities at his discretion for the plan's account, the advisor would be a fiduciary within the meaning of the act, and that is essentially what the Trustees did during the accumulation phase of the contract . . . .

Peoria Union, 698 F.2d at 327. By the same token, the non-guaranteed portion of GAC 50 offers neither benefit nor investment guarantees and, therefore, is not a "guaranteed benefit policy" as to that portion.

Moreover, in spite of the plain limitation contained in ERISA § 401(b)(2)(B) that an insurance policy or contract may only be treated as a guaranteed benefit policy "to the extent that" it provides for guaranteed benefits, petitioner and its *amici* argue that GAC 50 is a "guaranteed benefit policy" under ERISA. A careful examination of the operation of the policy, however, contradicts that conclusion.

The guarantee provided under GAC 50 was a promise that monthly benefits would be paid to a fixed group of annuitants for a fixed period of time (for life) in a fixed amount. However, under GAC 50, no annuity to secure those benefits is actually intended to be purchased. Instead, plan assets were transferred to the insurance company and placed on deposit in the company's general account. In theory, under the type of guaranteed benefit policy contemplated by ERISA § 401(b)(2), the amount deposited would equal the liability of the insurance company to provide the guaranteed benefit as described above. In fact, however, the value of the liability of the insurance company during each year of the life of the contract (i.e., until the last annuitant dies) varies based on the actuarial assumptions used to calculate that liability. GAC 50 purports to fix the value of these liabilities at the time of the contract by specifying the actuarial assumptions to be used (particularly the assumed interest rate to be applied to the investment of the plan assets in the general account of the insurance company). These

interest assumptions have tended to be conservative (i.e., lower than market), thus having the effect of overstating the actual liability and reducing the amount of "free funds" otherwise attributable to the contract.[2] As a practical matter, however, the liability actually guaranteed by GAC 50 is a function of its "true" actuarial value (e.g., the value based on current interest rates) in effect when the annuitants received their monthly payments. As real interest rates fluctuate and the actuarial present value of the benefits payable to participants changes over time, the value of the guarantee changes. Thus, some portion of the assets may not be attributable to guaranteed benefits. To the extent that amounts exist that are in excess of what would have been necessary to purchase an annuity providing the guaranteed benefits (although under GAC 50 no annuity was actually to be purchased), those amounts represent the non-guaranteed portion of the policy or contract and, consistent with ERISA § 401(b)(2) should be considered plan assets. Hence, consistent with the Second Circuit's opinion, Hancock is a fiduciary with respect to the non-guaranteed portion of the policy. To hold otherwise would read out of existence the clear limitation that Congress placed on the circumstances under which assets in the general account of an insurance company could be exempt from ERISA's fiduciary rules.

B. Contemporaneous Legislative History Of ERISA § 401(b)(2) Reinforces the Second Circuit's Interpretation

The legislative history supports this conclusion. The Conference Report clearly anticipates the bifurcation of a single policy into guaranteed and non-guaranteed portions for the purpose of determining what constitutes plan assets:

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[2] "Free funds" are the excess of the contracts' book value over the contractual cost of existing guaranteed benefits. Petitioner's brief at 8.

> If the policy guarantees basic payments but other payments may vary with, e.g., investment performance, then *the variable part of the policy and assets attributable thereto* are not to be considered as guaranteed, and are to be considered as plan assets subject to the fiduciary rules.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077 (emphasis added) ("ERISA Conf. Rep."). As the brief of the United States admits, "The Conference Committee's use of the word 'payments' rather than 'benefits' and its reference to the 'variable part of the policy' make more plausible the court of appeals' inference that Congress was thinking of payments to plans rather than payments to plan beneficiaries . . . ." U.S. at 21.

In addition, contrary to the protestations of Hancock and its *amici*, the legislative history makes clear that Congress anticipated that disruptions would occur in the insurance industry due to enactment of ERISA.

> The Committee is aware that there exists various established and recognized practices which are accepted in commercial banking, trust and insurance companies, investment companies and other advisors in connection with employee benefit plans. However, notwithstanding current acceptance of such practices, the Subcommittee has found it difficult to establish definitive criteria concerning those practices which should be specifically proscribed. The difficulty was weighed . . . against the overriding need to protect workers' pension funds, and [the Committee] concluded that the latter's interest outweighed any current attempt to define all practices and relationships which constitute not only actual but real potential threats to the security and preservation of the pension funds.

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4868.

Moreover, in order to minimize such disruptions, ERISA contains transition periods and procedures under which relief may be obtained. *See* ERISA §§ 408, 414.

> [T]he Secretary of Labor is authorized by the Act to waive any proscribed practice as long as it is consistent with the purposes of the Act and determined to be in the interests of pension plan participants. *The Committee is not unaware of the possible impact of these prohibitions*, and accordingly has made provision in the bill for an adequate transition period of 3 years, or longer, if warranted.

S. Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. at 4868 (emphasis added). "The conferees recognize that some transactions which are prohibited . . . nevertheless should be allowed in order not to disrupt the established business practices of financial institutions . . . consistent with adequate safeguards to protect employee benefit plans." ERISA Conf. Rep. at 5089-90.

These statements clearly demonstrate Congress' recognition of the impact of ERISA. The Third Circuit is simply incorrect in stating that Congress did not indicate its awareness of such disruptions. *See Mack Boring*, 930 F.2d at 275 n.17.

II. THE BRIEF OF THE UNITED STATES TAKES A NEW POSITION THAT COMPLETELY MISREADS ERISA § 401(b)(2); AS NOW INTERPRETED BY THE DEPARTMENT OF LABOR, IB 75-2 CONTRADICTS ERISA AND EXCEEDS THE DEPARTMENT'S REGULATORY AUTHORITY

The United States contends that the consistent position of the Department of Labor, since at least 1978, has been that all general account assets are excluded from ERISA fiduciary rules, except to the extent that they support variable benefits. However, the United States also claims that ERISA § 401(b)(2) is ambiguous and

would support both its interpretation and that of the Second Circuit.[3] "[T]he court of appeals' narrower construction . . . also finds support in the statutory text and has some advantages as a matter of policy." U.S. at 12.

As the record reveals, there is far more evidence that the statutory exemption is narrow and understandable, while the Department's position has been ambiguous and inconsistent. The Department's view that the enacted version of ERISA § 401(b)(2) and its legislative history "probably intended a relatively modest change" from the proposed broad exception is speculative at best and is not substantiated by the statute or its legislative history. U.S. at 10. Furthermore, the Department has no authority to take a position that conflicts with or undermines the plain words of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989).

Interestingly, the briefs of the petitioner and its *amici* contradict one another in their conclusions regarding the Congressional intent underlying ERISA § 401(b)(2). The allegedly consistent interpretation of the Department of Labor——that the purpose of § 401(b)(2) was solely to bring variable annuities sold from general accounts within the definition of "plan assets"—was clearly rejected by Hancock and its other *amici*. They state, without any caveats, that variable annuities may not be sold from insurance company general accounts.[4] If true, then

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[3] The brief also takes pains to distance the United States from the excesses of the petitioner's and other *amici's* arguments concerning the McCarran-Ferguson Act and the Third Circuit's and district court's misguided arguments concerning defined benefit plans.

[4] Hancock at 17, 19 n.30, 20 n.32; ACLI at 9 n.8, 11; NYMA at 4 n.3 ("only fixed benefit payments may be made from an insurer's general account. New York law permits the payment of variable benefits, but only from a separate account.")

the "relatively modest change" that the United States contends was made by the Conference Committee in finalizing ERISA § 401(b)(2) is not only "modest," it is nonexistent.

The United States rightly disagreed with the incorrect reading of the intent of ERISA in connection with defined benefit plans that was developed by the district court and adopted by the Third Circuit. U.S. at 22. Those opinions limit the protection of ERISA to individual benefit payments. *Mack Boring*, 930 F.2d at 273; *Harris I*, 722 F. Supp. at 1012. Rejecting that analysis, the United States writes, "The protections provided by ERISA do not extend solely to the treatment of participants and beneficiaries, to the exclusion of pension plans." U.S. at 22. However, the United States fails to acknowledge that this incorrect reading of ERISA's intent was a linchpin of those decisions.

ERISA clearly intends that pension plan investments be protected so that the funds invested by plans today will be available to pay promised benefits, whether defined or not, in the future. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 n.5 (1981). Congress was well aware that, due to malfeasance and imprudence by pre-ERISA plan administrators and investment managers, funds were often lacking when the time came to pay promised benefits to retirees.

The United States contends that this concern did not extend to pension investments in insurance company general accounts. U.S. at 23. The statute makes clear that Congressional concern only ebbed "to the extent" that the insurance companies guaranteed the payment of retirement benefits. ERISA § 401(b)(2)(B). Beyond that narrow safe-harbor, Congress had the same concerns with insurance company general accounts as it did with insurance company separate accounts, banks, investment managers and the like. ERISA Conf. Rep. at 5,077.

In fact, it is only "to the extent" that group annuity contracts provide individual retirees with guaranteed benefits that state insurance guaranty funds provide protection upon the insolvency of an insurance company. *See, e.g.*, Mass. Gen. Laws Ann. ch. 175, § 146(B)(4)(B)(2) (West 1993); N.Y. Ins. Law § 7703(b)(2) (McKinney 1993). This distinction made under state law is consistent with Congress's "guaranteed benefit policy" exemption and the belief that state laws protect workers and retirees only to the extent of individual benefit guarantees. Under state law, pension plans with group annuity contracts become general unsecured creditors of the insurer with respect to the non-guaranteed, "free funds" portion of the contract, with no entitlement to guaranty fund protection upon the insurer's insolvency. *Id.* If under well-recognized state insurance law concepts, funds not associated with benefit guarantees are not entitled to state guaranty fund protection, those funds should not be deemed guaranteed for ERISA purposes.

It should be noted that the federal government, through the Pension Benefit Guaranty Corporation (PBGC), may be at risk for the non-guaranteed portion of the retirement benefits promised under the pension plan. The PBGC insures pension benefits promised under most defined benefit pension plans. The PBGC has long claimed to be in financial distress and currently projects its potential deficit in excess of pension plan liabilities at up to $50 billion. It would be contrary to federal pension policy to exempt insurance industry controlled non-guaranteed general account assets from the fundamental fiduciary protections of ERISA, while leaving the PBGC at risk for any financial mismanagement or malfeasance of an insurance company due to court-created exemptions from federal law.

The crux of the United States' argument appears to be that the Department of Labor's 1975 Interpretative Bulletin, IB 75-2, on prohibited transactions (amended in

1978) created "settled expectations" within the insurance industry that group annuity contracts were completely exempt from the fiduciary rules and therefore, should not be disturbed by the courts. But, the Department of Labor's Interpretive Bulletin and its subsequent opinions are so ambiguous and inconsistent that the insurance industry would have been foolhardy to assume such a broad exemption. The insurance industry has never had any "settled expectations" concerning ERISA § 401(b)(2)(B).

Because, on its face, IB 75-2 refers only to prohibited transactions, the insurance industry had to be aware that any extension to the broader fiduciary responsibility rules rested on shaky foundations and likely exceeded the Department's authority. Certainly, the Seventh Circuit's 1983 *Peoria Union* decision eliminated any unquestioned basis for reliance upon IB 75-2(b). Aware of its tenuous position, the insurance industry tried to amend ERISA § 401(b)(2)(B) both before and after the Seventh Circuit's decision—*see* S. 3017, 95th Cong., 2d Sess. § 261 (1978), *reprinted in* ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Senate Committees on Labor and Human Resources and Finance, 95th Cong., 2d Sess. 40 (1978); S. 209, 95th Cong., 2d Sess. § 141 (1979), *reprinted in* ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess. 33 (1979)—both of which would have amended ERISA § 401(b)(2) to exempt all general account assets. In testimony before the Senate Labor and Human Resources Committee in February 1979 on S. 209, representatives of the insurance industry argued for changes to ERISA § 401(b)(2) that ". . . would make clear that, in the case of a plan which is funded by a contract or policy of insurance based on the company's general account, it is the contract that constitutes the plan asset, and not the underlying assets of the insurance company." ERISA Improvements Act of 1979: Hearings on S. 209

Before the Senate Committee on Labor and Human Resources, 96th Cong., 1st Sess. 851 (1979) (Statement of William T. Gibb and Paul J. Mason, on behalf of ACLI). However, industry representatives wanted the language proposed in section 141 of S. 209 to be "modified to refer to 'a contract issued by an insurance company', rather than to 'a contract or policy of insurance.' This would reflect the fact that some contracts used to fund employee benefit plans do not contain permanent guarantees. This may be so because the employer does not wish to purchase such guarantees or because the tax results are better without them or because of a combination of these reasons." *Id.* Thus the industry recognized that the statutory language of ERISA had to be amended to provide a broad exemption from the fiduciary rules necessary to accommodate the non-guaranteed portion of insurance policies or contracts such as that at issue here.

Furthermore, in connection with its attempts to issue a "plan asset" regulation more broadly applicable to ERISA's fiduciary rules,[5] the Department was besieged by insurance industry representatives seeking to write a complete general account exemption into the regulation. A 1979 proposal would have provided relief to the insurance industry, *see* 44 Fed. Reg. 50,363, 50,366 (Aug. 28, 1979), but was withdrawn in 1985. Thereafter, no similar provision was ever proposed by the Department.[6] The insurance industry was left only with the statement in the final Plan Asset regulation that the Department was leaving its position on prohibited transactions under IB 75-2(b) undisturbed. 29 C.F.R. § 2510.3-101 (1986).

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[5] The Congress, after 10 years of inaction by the Department, finally ordered the DOL in 1985 to issue its final regulation no later than Dec. 31, 1986. ERISA § 505.

[6] 29 C.F.R. § 2510.3-101 (1986). The final regulation merely states that IB 75-2(b) is unaffected by the regulation.

III. A COMPLETE EXEMPTION WOULD ELIMINATE FEDERAL PROTECTION FOR TENS OF MILLIONS OF WORKERS AND RETIREES; THE INSURANCE INDUSTRY HAS OVERSTATED THE DIFFICULTIES OF COMPLYING WITH ERISA

The overriding purpose of ERISA was to protect the retirement and other benefits promised to tens of million of workers, retirees, and their beneficiaries. The fiduciary obligation to invest pension plan monies prudently and solely in the interest of workers and retirees is crucial to making the protections of ERISA meaningful. If the insurer is not a fiduciary as to the pension assets over which it has discretionary control and has provided no retirement guarantee, then tens of millions of workers, retirees and their beneficiaries have lost their protection under federal law. The insurer, not the pension plan, controls the pension monies. The group annuity contract cannot be terminated without triggering the purchase of below market insurance annuities. The workers and the pension plan would be trapped, unable to protect their retirement benefits and unprotected by federal and state law. Such a result would make the promises and protections of ERISA meaningless.

The insurance industry repeatedly has claimed that it cannot modify its general account contracts to comply with both ERISA and state insurance laws. But the history of the insurance industry is replete with examples in which the industry, when forced by law or financial necessity, has found the wherewithal to do so. After the enactment of ERISA, most insurance company products sold to pension plans were revised. Entire new lines of insurance and investment products were created to meet the need of pension plans for stable and safe investments. Even in the instant case, John Hancock agreed to modify its group annuity contract on numerous occasions, including its 1988 agreement to return nearly $53 million to the plan. The insurance industry is hiding behind state law in order to deny the ability to provide separate pen-

sion plan accounts, even though the industry admits that most states allow insurance companies to maintain separate accounts for pension plans. *See* American Council of Life Insurance, *1992 Life Insurance Fact Book*, p. 57 (1992).

Another insurance industry investment product, the guaranteed investment contract (known as a GIC) also faced similar industry claims. After group annuity contracts, GICs are the next most popular insurance company product. Pension plans have hundreds of billions of dollars invested in GICs. Prior to 1991, most GICs were invested as part of an insurer's general account assets. As insurance company investment returns declined, many pension plans sought to create separate account GICs. The insurance industry resisted segregating its accounts, similarly claiming financial impossibility and conflict with state law. But, after the bankruptcy of the Executive Life Insurance Company, in which hundreds of pension plans were left holding worthless GICs which were not covered by most state guaranty funds, the insurance industry overnight was able to create a new insurance product—the separate account GIC.

Moreover, it is clear that ERISA and state insurance laws can and do co-exist. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (ERISA contemplates dual regulation of insured pension plans); *Chicago Board Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 260 (7th Cir. 1983). Insurance companies are subject to many of ERISA's requirements and take refuge in ERISA's preemption of state laws particularly as it has been read by the Court to limit remedies for violations of the law. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). The Department of Labor similarly rejects the insurance industry's assertions that dual regulation under ERISA and state insurance law is an impossibility. U.S. at 23 n.12.

Since 1975, the states and the federal government have regulated insurance company separate accounts without apparent difficulty. *See, e.g.*, N.Y. Ins. Law § 4240 (McKinney 1993); N.J. Stat. Ann 17B:28-1 to 17B:28-15 (West 1993); N.Y. Comp. Codes R. & Regs., Title 11, Chapter III, Part 50 "Separate Accounts and Separate Account Annuities"; N.Y. Comp. Codes R. & Regs., Title 11, Chapter IV, Part 97 "Market Value Separate Accounts Funding Guaranteed Benefits; Separate Accounts Operations and Reserve Requirements." In the context of separate accounts, the insurance industry has made ample use of the administrative procedures that ERISA provides and could do so in the future in order to secure any administrative relief which might be necessary to conform its contracts to the Second Circuit opinion. *See, e.g.*, DOL PTE 81-82, 46 Fed. Reg. 46,443 (Sept. 18, 1981); DOL PTE 88-92, 53 Fed. Reg. 38,798 (Oct. 3, 1988).[7]

Insurance company claims of impossibility are of questionable merit and should not be the basis on which this case is decided. Congress intended to provide broad protection to the retirement and other benefits promised to tens of millions of workers, retirees and their families and only permitted exceptions where other adequate protections existed. Upon a decision of this Court affirming the Second Circuit's interpretation of the statute, the insurance industry and the Department can begin the process of developing a workable scheme to comply with the law.

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[7] For instance, under its authority to grant class exemptions, ERISA § 408(b)(1), the Department could easily convert IB 75-2 into a class-wide ERISA § 406 exemption, thereby eliminating the hypothetical problem of prohibited tranactions in connection with general account contracts.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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July 9, 1993

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No. 92-1074

IN THE

Supreme Court of the United States

October Term, 1992

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE OF THE SPERRY MASTER RETIREMENT TRUST NO. 2,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Western Conference of Teamsters Pension Trust Fund ("WCT Fund") maintains a multiemployer pension plan with over 510,000 participants and beneficiaries, including 150,000 retirees and beneficiaries, and over 6,600 employers who contribute to the WCT Fund pursuant to collective bargaining agreements. The WCT Fund is one of the two largest multiemployer defined benefit funds in the country. It has approximately $11 billion in assets, over $1 billion of which is managed by an insurance company in its general account.

The WCT Fund shares in the variable investment return of the general account.[1]

The principal source of funding, aside from employer contributions negotiated through collective bargaining, is the WCT Fund's return on investments. If the returns on the Fund's general account assets were to be diminished or eliminated through actions of the insurance company, the Fund's ability to maintain overall benefit levels could be significantly affected. Accordingly, it is vitally important to the WCT Fund and the hundreds of thousands of participants and beneficiaries who rely on it for retirement security that the protections of the fiduciary responsibility provisions of ERISA remain intact with respect to its assets held in the insurance company general account.

SUMMARY OF ARGUMENT

The ultimate issue in this case is whether John Hancock Mutual Life Insurance Company ("Hancock") is a fiduciary, for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA"), with respect to an insurance contract ("GAC 50") issued to the Sperry Master Retirement Trust No. 2. The resolution of this issue turns on the nature of the funds underlying GAC 50. If any of those funds are deemed to be plan assets for purposes of ERISA, Hancock, by virtue of its management of those assets, would be an ERISA fiduciary with respect to those assets and would be subject to the strict rules governing ERISA fiduciaries. The Court of Appeals for the Second Circuit held that the so-called "free funds" under GAC 50 were plan assets and that Hancock was an ERISA fiduciary with respect to its handling of those assets.

Hancock and its *amici*, including the United States Department of Labor (the "Department" or "DOL"), contend that all of the assets underlying GAC 50 are entirely exempted from coverage by the

[1] Counsel for Petitioner and Respondent have consented to the WCT Fund's *amicus curiae* brief in letters filed with the Clerk of the Court.

fiduciary responsibility provisions of ERISA by reason of Section 401(b)(2) of ERISA, 29 U.S.C. § 1101(b)(2). The DOL contends, further, that its view on this matter has been consistent since the enactment of ERISA and that it is entitled to substantial deference.

Contrary to the assertions of Hancock and the DOL, the position now advocated by the DOL is not consistent either with its past pronouncements on this or related matters or with the intent of Congress when it fashioned the narrow exception in Section 401(b)(2).

On a number of occasions, the DOL has stated its view that Congress intended that, when an entity, including an insurance company, acts as a manager for a pooled investment vehicle in which a plan participates, such an entity is acting as an ERISA fiduciary and is subject to ERISA's fiduciary responsibility provisions. The DOL now takes a position that would ignore entirely the fact that a contract, such as GAC 50, is an investment vehicle under which the plan stands to gain or lose depending on the success of the insurer's investment activities. Instead, it would deny the protections of ERISA's fiduciary responsibility provisions, if at any time and to any degree, benefits are to be guaranteed by the insurer under the contract. This is a 180-degree turn from its long-held position regarding pooled investment accounts.

Congress clearly did not intend to exempt all contracts funded by insurance company general accounts from ERISA fiduciary regulation. It considered that option and rejected it. Instead, it chose a limited exception, which ensures that employee benefit plans and their participants and beneficiaries receive the full measure of protection afforded by ERISA when the plan is at risk with respect to an insurer's investment activities. The DOL's reading of Section 401(b)(2) would eliminate these protections and is wholly inconsistent with the intent of Congress. The strained interpretations offered by Hancock and the DOL run counter to well-established rules of statutory construction. Consequently, those interpretations must be rejected, and the DOL's position does not merit any deference.

Hancock and its *amici* also urge that the decision of the Court of Appeals be reversed because, they contend, (1) it will unduly disrupt the practices of employee benefit plans and insurers and (2) it is contrary to the allegedly long-held understanding of the insurance industry with respect to the scope of ERISA regulation of insurance company general account assets.

It is clear, however, that the practices of the insurance industry and pension plans will not be unduly disrupted as a result of the decision below. The holding below has been the law in the Seventh Circuit for a decade and there is no evidence of adverse consequences either to plans or to the insurance industry. Moreover, any concerns that are real can be addressed through existing administrative exemption procedures, which were fashioned by Congress to alleviate certain undesirable effects of the broad sweep of ERISA, while at the same time providing mechanisms which afford needed protections for plans and their participants and beneficiaries. There is no evidence that these existing exemption procedures are not adequate.

There is also no evidence that the decision below has caught the insurance industry by surprise. In fact, the record demonstrates that, ever since the enactment of ERISA, the industry has been well aware of and concerned with the limited exception from ERISA's fiduciary regulation afforded by Section 401(b)(2). However, rather than seeking to coexist with ERISA regulation of certain assets under general account contracts, it has sought to escape such regulation. It cannot now be heard to claim that it has relied on any understanding that its activities regarding the management of general account assets were wholly exempted from regulation under ERISA.

ARGUMENT

A. THE POSITION TAKEN BY THE DEPARTMENT OF LABOR IS CONTRARY TO THE CLEAR INTENT OF CONGRESS AND, THEREFORE, IS ENTITLED TO NO DEFERENCE.

The DOL argues that Section 401 (b)(2) of ERISA, 29 U.S.C. § 1101(b)(2),[2] exempts from all regulation under the fiduciary responsibility provisions of ERISA all assets held in insurance company general accounts under a contract which, at any time during its term, provides for the payment of fixed annuities. This position, in effect, would exempt from the protections afforded by ERISA all contracts funded through insurance company general accounts, even when the insurance company is making the very same type of discretionary management decisions that, if undertaken by another entity, would trigger the highest level of ERISA fiduciary obligations.

1. *The Department's Assertion That It Has Taken a Consistent Position on This Matter is Contradicted By the Record.*

a. The Relief Provided Under ERISA Interpretive Bulletin 75-2 Was Clearly Intended to be Limited to Prohibited Transactions and Was Not Intended to Apply to the General Fiduciary Responsibility Provisions of ERISA.

In an attempt to buttress its position, the DOL asserts that it has consistently taken the view that insurance company general account

[2] Section 401(b)(2) provides:

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:
>
> . . .
>
> (B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

assets are not plan assets for any purpose under ERISA. The cornerstone of this assertion is the DOL's claim that ERISA Interpretive Bulletin 75-2 (IB 75-2) was intended to apply to the general fiduciary duties provisions of Section 404 of ERISA, 29 U.S.C. § 1104, as well as to the *per se* prohibited transaction provisions of Section 406 of ERISA, 29 U.S.C. § 1106.[3]

However, the plain language of IB 75-2, the contemporaneous statement to Congress by the Assistant Secretary of Labor, and the context in which IB 75-2 was issued show without a doubt that IB 75-2 was intended to provide relief only from the prohibited transaction provisions of Section 406.

IB 75-2 itself made it absolutely clear that its purpose was to announce "rules for determining whether a party in interest has engaged in a prohibited transaction."[4] The DOL's claim that it was intended to be an interpretation of Section 401(b)(2)'s guaranteed benefit policy exception is not convincing, inasmuch as there is not one mention of that section or of guaranteed benefit policies anywhere in IB 75-2. It is also inconceivable that IB 75-2 could have been intended to apply to the general fiduciary duties provisions of Section 404, given that it made only one passing reference to those provisions.[5] Moreover, *all* of the substantive discussion in IB 75-2 focuses on party in interest prohibited transactions under Section 406.

The statement by Assistant Secretary of Labor, Paul J. Fasser, Jr., to the House Labor Standards Subcommittee during oversight hearings on ERISA shows unmistakably that the DOL's concern

[3] Section 404 sets forth general fiduciary obligations, such as prudence and diversification. Section 406 identifies conflict of interest transactions with a high potential for abuse, which are strictly prohibited. *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983).

[4] IB 75-2 as originally issued, *reprinted in* Pens. Rep. (BNA) No. 21 at R-7 (Feb. 10, 1975).

[5] The last sentence of IB 75-2 as it was issued in 1975 stated simply: "Further, the Department of Labor emphasized that it would consider a fiduciary who makes or retains an investment in a corporation or partnership for the purpose of avoiding the fiduciary responsibility provisions of the Act to be in contravention of the provisions of Section 404(a) of the Act."

when it issued IB 75-2 was solely with the broad impact and the *per se* nature of the prohibited transaction rules.[6]

As an example of the difficulties created by the prohibited transaction rules, Assistant Secretary Fasser described a large multiemployer plan (much like the Western Conference of Teamsters Pension Plan, which has thousands of contributing employers that are parties in interest[7]), that had purchased an insurance policy under which "the benefits [were] wholly insured, but not fully guaranteed."[8] He explained that the insurance company invested the premiums received from the plan along with premiums from other policyholders. After describing the difficulties created by the application of the prohibited transaction rules to these general account assets and with no reference whatsoever to the general fiduciary duties under Section 404, he went on to say that:

> We studied the law and the underlying rationale of the *prohibited transactions provisions*, we studied the legislative history, we conferred with our colleagues at the Internal Revenue Service, we applied our collective common sense, and we concluded that Congress did not intend this result [*i.e.*, application of the prohibited transaction restrictions]. We recognized that the prohibited transactions restrictions are designed to avoid conflict of interest situations, but we knew that where the premiums paid by a plan are placed in an insurance company's general asset account, along with assets of many other plans, the risk of any one plan being able to influence the investment policy of the insurance company respecting the general asset account is extremely slight.

[6] *Oversight on the Employee Retirement Income Security Act of 1974:* Hearings on Pub. Law 93-406 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 390-391 (1975) ("Oversight Hearings").

[7] The term party in interest, as defined under Section 3(14) of ERISA, 29 U.S.C. § 1002(14), encompasses a wide variety of persons with relationships to a plan, including contributing employers, service providers, sponsoring unions, and employees of such.

[8] Oversight Hearings at 390.

(emphasis added).[9] The Assistant Secretary never suggested that the Interpretive Bulletin (IB 75-2) was intended to address anything but prohibited transactions.

To understand the genesis of IB 75-2, it also is necessary to keep in mind that it was issued at the dawn of ERISA, when the broad sweep of the prohibited transaction provisions was the principal focus of concern,[10] but when the congressionally mandated procedures for promulgating administrative exemptions had not been developed.

Recognizing that the *per se* prohibited transaction rules would encompass many legitimate transactions, Congress authorized the Secretaries of Labor and Treasury to jointly issue administrative exemptions. Congress required the establishment of an exemption procedure, which, among other things, would require publication of proposed exemptions in the Federal Register, allow adequate time for public comment, and require public hearings in certain cases.[11] However, this procedure was not in place when the prohibited transaction rules took effect on January 1, 1975 and was not issued until April 28, 1975.[12] Moreover, the procedure contemplated by Congress — publication of a notice of pendency, a comment period, a public hearing, *and* coordination and cooperation between Federal agencies with substantially different goals — did not lend itself to a quick fix.

[9] *Id.* at 391.

[10] *See* Oversight Hearings, testimony of Assistant Secretary Fasser, 390-395; testimony of Commissioner of Internal Revenue, Donald C. Alexander, 473-475; testimony of Robert A. Georgine, President of AFL-CIO Building and Construction Trades Department, 358-360. The concern regarding the application of the prohibited transaction rules is understandable, in that they, unlike the general fiduciary duties provisions, are *per se* rules. A party in interest that engages in a prohibited transaction, no matter how innocent, is subject to stiff excise taxes under 26 U.S.C. § 4975, and a plan fiduciary that causes a plan to engage in the transaction is exposed to personal liability under Section 409(a) of ERISA.

[11] ERISA § 408(a), 29 U.S.C. § 1108(a).

[12] 40 Fed. Reg. 18471.

Therefore, although the DOL and the IRS had the authority to grant relief from the broad sweep of the prohibited transaction rules, they were not in the position in early 1975 to do so quickly and in compliance with the congressionally mandated procedure. Consequently, they resorted to the Interpretive Bulletin process to address several major areas of concern regarding the prohibited transaction provisions, including the impact of those provisions on the investment of assets in the general accounts of insurance companies.[13] IB 75-2 was the result.

Accordingly, it is clear that IB 75-2 was not intended to be an interpretation of Section 401(b)(2), nor was it intended to exempt general account assets from the general fiduciary duties rules. Moreover, any attempt to create such an exemption would have been completely unauthorized. By its own admission, the DOL does not have the authority to issue exemptions from the general fiduciary duties provisions of ERISA.[14] And, as is discussed below, an "interpretation" of Section 401(b)(2) which would entirely exempt general account assets from ERISA fiduciary regulation is contrary to the remedial purpose of ERISA and the clear intent of Congress.[15]

b. The Department's Advisory Opinions and the Development of the Plan Asset Regulation Evidence General Views Consistent with the Holding of the Second Circuit.

The administrative opinions of the DOL subsequent to the issuance of IB 75-2 reflect a consistent view that the fiduciary

[13] Oversight Hearings, Fasser at 391.

[14] Oversight Hearings, Fasser at 393-394. ("Exemptions from the general fiduciary responsibility provisions cannot be granted.")

[15] It should be noted that the DOL overstepped its authority when it promulgated IB 75-2 with respect to insurance company general account assets, because IB 75-2 is effectively a prohibited transaction exemption and the DOL did not publish a notice of proposed exemption, allow public comment, or hold a public hearing as required by Section 408(a). Accordingly, IB 75-2 could be challenged even with respect to its facially intended purpose. This was clearly a concern of the insurance industry. *See* Minutes of the American Council of Life Insurance ("ACLI"), September 16, 1976. Append. A-17. (The material in the Appendix accompanying this brief was obtained from the appendix attached to an *amicus curiae* brief filed with the Court of Appeals for the Third Circuit in *Mack Boring & Parts Co. v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991).)

responsibility provisions should apply to the managers of pooled investment arrangements, including insurance companies. At the same time, however, DOL has exhibited uncertainty and confusion as to the nature of general account contracts. This uncertainty and confusion undoubtedly led to the paralysis of indecision evidenced in the DOL's inability to provide its views to the Court of Appeals below.

Advisory Opinion 78-8A (March 13, 1978), in which the DOL implicitly acknowledged that it did not understand the nature of the contracts that could be funded from general accounts, reflected the DOL's belief that it was the intent of Congress that "when an insurance company provides investment advice which determines the rate of return *to the plan* and its participants, the assets in the account shall constitute plan assets so that the insurance company is subject to the fiduciary responsibility provisions of the Act" (emphasis added). It went on to say that IB 75-2 "was not intended to modify or alter the basic statutory scheme of Section 401(b)(2) of the Act." This analysis properly ignores the label of the insurance company account (*i.e.*, general vs. separate), and goes to the heart of the matter -- the nature of the service provided by the insurance company (*i.e.*, investment management versus insurance).

A similar approach, also consistent with the congressional intent underlying Section 401(b)(2), was taken by the DOL in Advisory Opinion 83-51A. There again, the DOL ignored the label given to the account under the contract issued by the insurance company and looked to the substance of the contract. The DOL, in discussing the application of Section 401(b)(2), stated that, in its view, assets held in a *separate account* would *not* be plan assets if the contractual obligations of the insurance company were fixed *and* "if neither the amount *payable (or credited to) the plan* or to any participant or beneficiary of the plan (including an annuitant) is affected *in any way* by the investment performance of the separate account" (emphasis added).[16] The clear import of Advisory Opinions

[16] It is instructive that the DOL focused on payments to the plan as well as payments to participants and beneficiaries for purposes of the application of the Section 401(b)(2) exception for guaranteed benefit policies. This is contrary to the DOL's new position that a contract can be a guaranteed benefit policy even if there is a significant variable investment component.

78-8A and 83-51A is that substance should prevail over form. This is in keeping with the remedial purpose of ERISA and is in sharp contrast to the position now taken by the DOL in its *amicus* brief.[17]

The DOL's lack of understanding regarding the nature of general account contracts was again reflected in its first attempt at issuing regulations to give guidance on the meaning of "plan assets." In the preamble to its original proposed regulation, the DOL stated that:

> a functional analysis leads to the conclusion that with respect to a wide variety of pooled investment vehicles [such as general account contracts with variable return features], when a plan invests some or all of its assets in a pooled investment vehicle, the plan is, as a practical matter, retaining the management of that investment vehicle to manage that portion of the plan's assets which is so invested. *It would be unreasonable to suppose that Congress intended that the protections of the fiduciary responsibility provisions of the Act which are applicable when a plan retains a manager of its investments directly would not be applicable where the manager is retained indirectly, through investment by the plan in a pooled investment vehicle.*

(emphasis added).[18]

This, of course, is entirely consistent with the clear intent of Congress with respect to Section 401(b)(2). However, in the same preamble, the DOL's discussion of the application of Section 401(b)(2) suggests that it was not aware of the substantial investment components of many general account contracts. On the one hand, it notes in

[17] In its *amicus* brief, the DOL points to Advisory Opinion 75-79 as proof of its allegedly consistent approach to this matter. However, it appears from the meager facts set forth in that letter that the question presented to the DOL dealt with the fiduciary duties of, and the need for fiduciary insurance by, plan fiduciaries who select an insurance contract. Moreover, as the DOL effectively admitted in Advisory Opinion 78-8A, it did not have a full understanding in 1975 of the kinds of contracts that could be written from insurance company general accounts.

[18] 44 Fed. Reg. 50364 (August 28, 1979).

a footnote that it has interpreted Section 401(b)(2) to mean "generally that assets held in an insurer's general account *to support benefits* under a contract purchased by a plan are not plan assets" (emphasis added).[19] This would seem to suggest that the exception in Section 401(b)(2) was intended to apply only to those fixed assets currently supporting guaranteed benefits (as opposed to assets that have not been committed to support particular benefits or assets that are subject to variable returns). This too would be consistent with a narrow application of the Section 401(b)(2) exception.

However, in the further discussion in the text of the preamble, the DOL states broadly that, when a plan purchases a contract or policy funded through an insurance company general account, the assets of the plan "will not necessarily be deemed to include any assets of the . . . insurer."[20] It went on to state that this exception "appears to be based upon the fact that the plan benefits provided under such contracts or policies are insured by an entity which is subject to state regulation designed to assure the entity's ability to pay benefits specified in the policies when due."[21] Read in the context of its other statements quoted above, this suggests that the DOL was under the mistaken notion that contracts and policies funded by general accounts consisted principally of guaranteed benefits.

The regulation proposed in 1979, which included an explicit exception for general account contracts or policies, was never finalized and was withdrawn in 1985. It was replaced by a proposed regulation,[22] which was finalized in 1986.[23] Neither the reproposed regulation or the final regulation address this issue.

It is instructive to review briefly what transpired between 1979

[19] *Id.* at n. 4.

[20] *Id.* at 50364.

[21] *Id.*

[22] 50 Fed. Reg. 961 (January 8, 1985).

[23] 29 C.F.R. § 2510.3-101 (1986).

and 1986. First, as discussed below in Section C, the insurance industry was engaged in a continuous effort to elicit the support of the DOL in obtaining legislation which would provide the relief that Section 401(b)(2) clearly did not provide, *i.e.*, a broad exemption from ERISA fiduciary regulation for all general account assets, whether or not they were fixed, and funded guaranteed benefits. In addition, the Court of Appeals for the Seventh Circuit handed down a decision in 1983 which applies the Section 401(b)(2) exception narrowly in keeping with the intent of Congress.[24] Thereafter, representatives of the insurance industry met with the Department's ERISA Administrator to discuss a legislative solution regarding the industry's concern over the treatment under ERISA of general account contracts.[25] The DOL response makes it clear that, in 1984, the DOL realized that it needed a better understanding of the insurance products funded through general accounts.[26]

The insurance industry submitted additional information in late 1984 and met with representatives of the DOL on March 5, 1985. According to an ACLI memorandum dated June 28, 1985, the DOL's career staff found the ACLI's proposed legislation unacceptable, because the staff were concerned that no exception from coverage by ERISA's remedial provisions should be made in the case of, among other things, "contracts which are essentially indistinguishable from non-guaranteed separate account arrangements."[27]

The DOL's concerns regarding a complete exception for general account contracts were reflected in the fact that, despite the urging of

[24] *Peoria Union Stock Yards Co. Pension Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983)

[25] Letter from Robert A.G. Monks, Administrator of the DOL's Office of Pension and Welfare Benefits Programs to Richard Minck, Executive Vice President of the ACLI, dated June 1, 1984. Append. A-81.

[26] The DOL responded that it was not prepared to support the proposed legislation and that it needed "information regarding the different types of general account products which insurance companies offer, so that we could better understand the situation." *Id.*

[27] ACLI Memorandum, dated June 28, 1985. Append. A-88.

the ACLI,[28] it did not include in the final regulation the language from the 1979 proposed regulation which would have given a broad exemption for general account assets. All that the DOL was willing to do was to make the ambiguous statement in the preamble to the final regulations that "the portion of Interpretive Bulletin 75-2 dealing with contracts or policies of insurance is not affected by the regulation being issued here."[29]

Such was the state of affairs when in 1992, the Court of Appeals for the Second Circuit invited the DOL to provide its views on the issues before it in the case below. Remarkably, the DOL was unable to do so, even with an extension of time. In requesting the extension, the DOL admitted that it had *not* formulated a final position on the issue, that the case was complex, and that more time was needed to examine the legislative and regulatory history.[30] After an extension of almost three months, the DOL admitted that it needed still more time to consider fully all of the implications of the legal and policy issues involved, and declined to provide its views.[31]

Thus, any assertion that the DOL has held a consistent position that Section 401(b)(2) entirely exempts general account assets is belied by the record and the DOL's own admissions.

2. The Department's View is Not Entitled to Deference.

a. The Department's Position Is Contrary to the Clear Intent of Congress.

While it is true that the courts must give due deference to the views of agencies charged with statutory administration,[32]

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[28] *See* Memorandum of March 5, 1985 meeting with DOL. Append. A-83.

[29] 51 Fed. Reg. 41272, 41278.

[30] *Harris Trust and Savings Bank v. John Hancock Mutual Life Insurance Co.*, 970 F.2d 1138, 1140 (2d Cir. 1992).

[31] *Id.* at 1141.

[32] *Chevron U.S.A. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[33]

It is clear beyond a doubt that Congress did not intend to provide a blanket exception from the fiduciary duties provisions of ERISA for assets in insurance company general accounts, which is the practical effect of the position taken by the DOL in its *amicus* brief. Congress clearly was familiar with general and separate accounts and clearly knew how to fashion an exemption that would have excluded all general account assets from ERISA regulation. In fact, such an exemption had been considered, had been included in the Senate version of the bill, and was abandoned. It is inconceivable that Congress would have coined a new term, "guaranteed benefit policy," to mean nothing more than a policy or contract funded through general account assets.

Therefore, the DOL's position is contrary to the clear intent of Congress and cannot control, and it should not be given any deference.[34]

b. The Department's Position Is Not a Permissible Interpretation of the Statute.

Even if the DOL's position were not so clearly contrary to the intent of Congress, it would not be entitled to deference because it is not a "'permissible' construction . . . that is 'rational and consistent with the statute.'"[35]

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[33] *Id.* at 843 n. 9 (citations omitted).

[34] *Chevron*, 467 U.S. at 842-43 ("the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

[35] *PBGC v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citations omitted).

As demonstrated above Congress in Section 401(b)(2) did not create an exception to ERISA fiduciary regulation with respect to all assets held in an insurance company general account. The plain and unambiguous language of that section provides an exemption from regulation under Part 4 of ERISA which is limited by the "to the extent" language. It is further limited by the reference to "benefits," which both the DOL and the Petitioner would correctly give a narrow meaning. The ERISA Conference Committee's explanation of the exception found in Section 401(b)(2) makes it crystal clear that, in limiting the exception by use of the "to the extent" language, Congress intended that insurance policies and contracts would, in fact, be bifurcated for purposes of applying the fiduciary rules of ERISA. The Committee gives, as an example of how Section 401(b)(2) is to be applied, a *single* policy with a guaranteed portion and a nonguaranteed ("variable") portion and states, in no uncertain terms, that only the guaranteed portion would be excepted from the fiduciary rules and that the other portion would be subject to those rules.[36]

It also is clear that the Committee was not referring to a policy under which part of the assets are invested in a general account and part of which are invested in a separate account, because it explained in the next paragraph how separate account assets are to be treated.[37] Finally, the Department's surmise that the Committee intended the term "payments" to refer only to benefits paid to individuals, DOL *amicus* brief at 21, is contradicted by the fact that the Committee distinguished between "basic payments," which were guaranteed, and "other payments" which varied with investment performance. Inasmuch as the Committee was describing payments made under one single policy, it is more likely that it was using "basic payments" to mean benefits paid to participants or beneficiaries and "other payments" to mean payments made to the plan.

The logical result of the construction favored by Hancock and its *amici*, including the DOL, would be that an insurance contract

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[36] H.R. Cong. Rep. No. 1280, 93d Cong., 2d Sess. 296 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077.

[37] *Id.* at 296-297.

would be deemed a "guaranteed benefit policy" and the insurer would escape ERISA fiduciary regulation, if the contract was designed (by the insurance company) to include some minimal element of guarantee regarding plan benefits. Indeed under these constructions, a contract, through which a plan commits millions of dollars to an insurance company for management, would be a guaranteed benefit policy if the benefit of only one participant was guaranteed.

It is undisputed that ERISA is a remedial statute designed to protect participants and beneficiaries and their plans.[38] Exceptions to ERISA's protective provisions, such as the exception found in Section 401(b)(2), must be construed narrowly.[39]

Congress recognized this long-standing rule of construction and intended it to be applicable to ERISA. "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."[40] The DOL's application of Section 401(b)(2) would turn this traditional and congressionally mandated rule of construction on its head. It would replace a rule which looks to the substance of a policy or contract with one that looks only to form. The fact that Congress adopted a standard which is not a bright line test, but which, instead, requires a careful examination of the policy or contract in question, does not make the statute ambiguous and does

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[38] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans" (citations omitted)). It is clear, as the DOL has stated on numerous occasions, that, in creating ERISA, the intention of Congress was (1) to protect participants and beneficiaries of employee benefit plans by, among other things, establishing strict fiduciary standards for the investment of plan assets and (2) that managers of pooled investment vehicles to whom plan assets are given are to be subject to those standards. *See, e.g.*, proposed revision to plan asset regulations, 45 Fed. Reg. 38084 (June 6, 1980).

[39] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)(holding that an exemption from a remedial statute is to be extended only to "those plainly and unmistakably within its terms.")

[40] S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973), *reprinted in* U.S.C.C.A.N. 4838, 4854 (1974).

not give the DOL license to substitute a standard which is easily applied, but which deprives plans and their participants and beneficiaries of protections established by Congress. Such a construction[41] would be an unacceptable "abuse [of] the interpretive process." [42]

Therefore, in keeping with the remedial purposes of ERISA, congressional intent that exceptions to its remedial provisions be read narrowly, and the longstanding rule of statutory construction, the exception contained in Section 401(b)(2) must be read narrowly to apply to assets held by insurers under contracts or policies issued to ERISA plans only *to the extent* benefit payments to participants and beneficiaries are guaranteed. To the extent such policies or contracts also act as investment vehicles for plans, the assets must be subject to the protections afforded by ERISA.[43]

[41] The DOL's "interpretation" expressed in its *amicus* brief is more properly characterized as legislative regulation (even though it did not follow the required regulatory process in developing the interpretation). And, although on occasion Congress leaves it to an agency to fill in statutory gaps, such is not the case here. Moreover, even if serious difficulties were presented by the reasonable application of Section 401(b)(2), a solution should be fashioned by Congress. It is clear that the DOL has had and still has a great deal of difficulty understanding the practices of the insurance industry. And well it should, these practices are very complicated and ever-changing. *See* note 43 below. This is not an issue that should be resolved through an ostensible interpretation.

[42] *A.H. Phillips*, 324 U.S. at 493.

[43] As the Court of Appeals for the Seventh Circuit correctly concluded, many contracts which are funded by general account assets and which "provide for" the possibility of securing guaranteed annuities are little more than variable investment vehicles. *Peoria*, 698 F.2d at 327. As described in a leading text, Dan M. McGill and Donald S. Grubbs, *Fundamentals of Private Pensions* 492 (6th ed. 1989): "Life insurers offer certain contractual arrangements that do not contemplate the purchase of annuities for vested or retired employees and are designed to be purely investment vehicles for pension plan assets. The assets under these contracts may be held in the general account of the insurer or in one or more separate accounts." (This statement flatly contradicts the proposition for which this text is erroneously cited by *amicus* ACLI. ACLI *amicus* brief at 9 and n.8.) Moreover, in Everett T. Allen, Jr., Joseph J. Melone and Jerry S. Rosenbloom, *Pension Planning* 228 (5th ed. 1984), the authors discuss the complicated evolution of insurance products for pension plans, including the IPG type of contract at issue here, noting that an IPG contract involves "a further reduction in insurer guarantees and the immediate reflection of actual [investment] experience under the plan. . . ."

B. THE RULING BELOW WILL NOT BE UNDULY DISRUPTIVE FOR PLANS OR THE INSURANCE INDUSTRY.

The dire consequences of the ruling below which are predicted by the Petitioner and its *amici* unravel upon examination. Two principal concerns are expressed: one focusing on the impact of the prohibited transaction provisions and the other focusing on the "solely in the interest/exclusive purpose" requirements of Section 404. Both concerns are illusory.

As is discussed above, the DOL has the authority to grant exemptions from the prohibited transaction provisions. It has exercised this authority numerous times in a wide variety of circumstances. For example, among the exemptions it has issued is a class exemption covering pooled investment accounts of insurance companies, which came in response to a request submitted by the Petitioner and the ACLI, among others.[44] The difficulties which this exemption is designed to address are the very same difficulties listed by the Petitioner and its *amici*, *i.e.*, large numbers of investors, thousands of parties in interest, and thousands of transactions that would be technical prohibited transactions.

There is no reason why the DOL cannot fashion a prohibited transaction exemption, with retroactive as well as prospective effect, which addresses the concerns of the industry and provides necessary protections for plans and their participants and beneficiaries.

The second professed concern is equally contrived. The Petitioner and its *amici* assert that, if assets in a general account are held to be plan assets, insurance companies will be required by the fiduciary rules of ERISA to favor ERISA plan contract holders over non-ERISA plan contract holders. However, the practice of the industry with respect to pooled separate accounts contradicts this assertion.

For years, insurance companies have maintained pooled accounts containing the commingled plan assets of many employee

[44] 42 Fed. Reg. 54886 (Oct. 11, 1977).

benefit plans subject to regulation under ERISA.[45] The insurance companies are fiduciaries with respect to each plan in a pooled account. Although the plans share certain identical interests with respect to the assets in a pool, each plan also has its own separate needs and interests, which may conflict at times with the general interests of all of the plans.[46] However, no one has ever suggested that the insurance company faces an irreconcilable conflict of interest because it owes separate Section 404 "solely in the interest" duties to each plan. It is a given and it is understood that the insurance company's duty is to look after the collective interests of all of the plans. The insurance company would not be required to favor the individual interests of one plan over another. The insurance company, however, would not and should not be able to favor itself over a plan investor. Neither the Petitioner nor any of its *amici* have demonstrated that a similar analysis would not be appropriate with respect to the management of general account assets subject to ERISA regulation.

Moreover, if the insurance industry has developed investment vehicles which indeed create real irreconcilable conflicts between investors, assets can and should be segregated. The industry should not be allowed to develop products which seemingly create conflicts under ERISA and then be heard to argue that ERISA should not be applied because it would be difficult to resolve the problems the industry has created.[47]

Finally, in all candor, the Petitioner and its *amici* must admit that the insurance industry, as we know it, has not collapsed in disarray in the Seventh Circuit, where the ruling below has been the

[45] *Id.*

[46] For example, one plan might find itself with an immediate cash flow problem at a time when it would be disadvantageous for the other plans to liquidate investments in the pool.

[47] Indeed, the history of the insurance industry has been marked by a remarkable adaptability to the pressures of the marketplace which have caused it to alter the nature of its general account products in fundamental ways to meet demands for flexibility in benefit design and for participation in investment experience. Allen, Melone and Rosenbloom, *supra*, at 207-30; McGill and Grubbs, *supra*, at 492 ("[l]ife insurance companies compete head-on with banks and trust companies for the management of pension plan assets.") Moreover, such adaptation has

(footnote continued on next page)

law for a decade. It is also noteworthy that the supposed conflicts which the insurance industry claims are the source of its concern here were not made an issue in *Peoria*. The issue in *Peoria*, and the real issue here, is potential self-dealing by insurance companies for their own benefit. The Seventh Circuit recognized that fact in *Peoria* and recognized the importance of giving full effect to the protections incorporated into ERISA by Congress. It is equally important to give effect to those protections here.

C. THE INSURANCE INDUSTRY HAS BEEN WELL AWARE OF THE LIMITED SCOPE OF SECTION 401(b)(2) AND THE LIMITED EFFECT OF IB 75-2.

From the beginning, the insurance industry has been aware of and concerned about the impact of ERISA fiduciary responsibility standards, particularly on its general account operations. This concern was well-justified as the industry was also aware that Section 401(b)(2)'s guaranteed benefit policy exception was too narrow to accommodate all of the varied products issued under insurer general accounts. Therefore, it continually lobbied for a satisfactory legislative or regulatory solution tailored broadly to exclude all general account contracts. These attempts have been properly unsuccessful.

ERISA, as finally enacted in 1974, did not contain the specific exception for general account assets that had appeared in the Senate bill. DOL *amicus* brief at 20. Shortly thereafter, when the American Life Insurance Association (ALIA), the predecessor to ACLI, assigned a task force to study various aspects of ERISA, it was forced to conclude that "[w]hile it is clear that assets in a separate account would be treated as 'plan assets' under this provision, it was agreed

required the cooperation and approval of the state insurance regulators. *See id.* at 494 ("momentous step" of creating separate accounts under state insurance laws for pension plan customers done under "authority of special legislation or administrative interpretation of existing law"). There is no reason to believe that the industry, with the assistance of state insurance commissions, will not bring to bear the same resourcefulness in meeting the fiduciary responsibilities imposed by the reasoning of the Second Circuit below.

that it is not clear what types of policies based on the general account (if any) would cause general account assets to be similarly treated."[48] In light of this virtual concession that not all general account contracts may be guaranteed benefit policies, it was agreed that ALIA would seek a general ruling exempting general account assets from the prohibited transaction rules.[49] This approach was preferred over "arguing that all policies are 'guaranteed benefit' policies"[50] presumably because of the difficulties presented by such an argument.

After the prohibited transaction exception of IB 75-2 was obtained, ACLI convened a meeting in 1976 to discuss the need for legislative relief specifically exempting general account assets for all purposes, describing the necessary language as follows:

> "[t]he assets in an insurance company's *general asset account* will not be considered 'plan assets,' and the insurance company, thus, will not be considered a plan fiduciary by reason of managing those assets, for any employee benefit plan holding contracts based on that account."

(emphasis in original).[51] Such a legislative amendment "was thought desirable by the [ACLI] in light of the questionable rationale of the Government ruling [*i.e.*, IB 75-2] and the contention by some employers that it may not withstand a legal challenge."[52] However, no such legislative relief was forthcoming.

ACLI's Pension Committee met again, in October 1979, to discuss the continuing problem of general account treatment under ERISA. This time ACLI discussed ways to revise the DOL's recently

[48] ALIA Minutes, dated September 18, 19 and October 2, 1974. Append. A-8

[49] *Id.* Append. A-8 It is noteworthy that ALIA's focus here is consistent with the proper interpretation of IB 75-2 as limited to prohibited transactions.

[50] *Id.*

[51] ACLI Minutes, dated September 16, 1976. Append. A-16.

[52] *Id.* Append. A-17.

proposed plan asset regulations. Specifically, the Committee discussed how "[t]he regulations should be revised to make clear that, in the case of a plan funded with a contract or policy of insurance, plan assets do not include the underlying assets in the insurance company's general account, whether or not the contract insures plan benefits."[53] As this discussion makes clear, the industry remained insecure in 1979 about the extent of protection offered by ERISA and IB 75-2. Of course, the reference in the above quoted language to general account contracts, which do not even insure benefits, discloses the source of the industry's insecurity: contrary to the theme that runs through the briefs of Hancock and various *amici*, general account contracts, as noted elsewhere,[54] can be nonguaranteed or variable in many respects even with respect to benefits.

Indeed, it appears to be the industry's inability to give adequate assurances to the DOL regarding the nature of general account contracts which led to the defeat of its next major campaign for legislative relief. Beginning in late 1983 after issuance of the *Peoria* decision, the ACLI again revisited the perennial problem of fiduciary coverage of general account assets:

> As you are all well aware, ever since the enactment of ERISA, there has been concern regarding the treatment of general account assets and the potential application of ERISA's fiduciary responsibility provisions and prohibited transaction rules to these assets. . . . [S]ome companies believe that unless some action is taken quickly, either legislative or regulatory or a combination of both, the issue will be decided adversely to the industry."[55]

Consequently, in 1984 and 1985, industry representatives made formal submissions to the DOL and held a series of meetings with

[53] ACLI Pension Committee Memorandum, dated October 16, 1979. Append. A-26-27.

[54] *See* notes 43, 57 and 58 and accompanying text.

[55] ACLI Letter to Task Force on Fiduciary Matters, dated December 16, 1983. Append. A-39.

DOL representatives.[56] The written submission made in March 1984 described general account contracts as involving the credit of "interest and other amounts, such as dividends or rate credits, that *to some extent* were expressly guaranteed and *to some extent* left to the discretion of the insurer based on its investment and mortality experience" (emphasis added)[57] The submission went on to note that "[b]ecause many of these contracts provide for varying degrees of participation by the contractholder in the investment, mortality, or expense experience of the insurer, few of the contracts can factually be said to be totally 'guaranteed.'"[58]

It should have been no surprise when the DOL's response was not overwhelming. By letter dated June 1, 1984, the DOL informed ACLI that it was not prepared to support legislation dealing with the general account issue, citing the need for further information regarding the nature of the general account products issued by the industry.[59] The industry, therefore, continued to press the matter and another formal meeting with DOL representatives was held on March 5, 1985.

The clear focus of this meeting, from the DOL's point of view, was the nature of general account policies with particular emphasis on the payments made to the plan under such policies. For example, a DOL representative asked whether general account policies always

[56] ACLI Letter to Pension Committee, dated March 22, 1984, attaches the submission (DOL Submission) and shows a March 23, 1984 meeting with Secretary of Labor Donovan and others. Append. A-41. ACLI Memorandum, dated April 19, 1984, Append. A-70, speaks of a meeting with DOL staff. ACLI Memorandum of March 5, 1985 meeting with DOL staff. Append. A-82-85. ACLI Memorandum, dated October 9, 1985, Append. A-94, refers to another meeting with DOL staff.

[57] DOL Submission. Append. A-47. The language used bears a striking similarity to the "to the extent" language of the guaranteed benefit policy definition; even the industry has acknowledged, in moments of candor, that general account contracts are guaranteed only in part.

[58] *Id.* Append. A-49.

[59] Letter from Robert A.G. Monks, Administrator of the DOL's Office of Pension and Welfare Benefits Programs to ACLI, dated June 1, 1984. Append. A-81.

guaranteed principal and interest.[60] Another question went to whether:

> it was possible for an insurance company to issue a general account contract that would provide nothing more than the policyholder's participation in a pro rata portion of the investment performance of a particular segment [of the general account], such that the contract would operate no differently than a separate account contract.[61]

The hedging response of the industry representatives was not particularly reassuring:

> We initially indicated that our survey did not reveal that this type of contract was being offered by an insurance company. Secondly, we indicated that it might be disadvantageous or impossible to offer such a product because of tax or state insurance considerations.[62]

The DOL's reaction to this meeting was definitive. As the ACLI described it:

> the Labor Department has rejected our legislation and has suggested instead that legislation be drafted that would: (1) treat general account contracts similar to any other investment a plan makes so that a determination would have to be made as to whether a plan which purchases a general account contract is purchasing a debt or equity interest; and (2) require insurance companies to disclose to a prospective purchaser the key features of the contract he is interested in purchasing including, among other things, a description of what would happen upon a premature termination of the contract.[63]

Therefore, in 1985, the insurance industry was highly insecure about the regulatory and legislative treatment of general account assets. Far

[60] ACLI Memorandum of March 5, 1985 meeting with DOL. Append. A-83.

[61] *Id.* Append. A-85.

[62] *Id.*

[63] Letter from ACLI to General Account Legislative Strategy Group, dated May 17, 1985. Append. A-86.

from the broad exemption the industry claims to have consistently relied upon, it was faced in the mid-1980s with a Department that advocated application of the general plan asset test to general account contracts. Moreover, the DOL was inclined at the time to require special disclosures to plan sponsors about the contract termination provisions that are so often the subject of fiduciary breach actions against insurers.[64]

Understandably, the industry continued to work for legislative relief, which it had been told could not be accomplished without support from the DOL. To achieve its goal, ACLI attempted to draft legislative language that would accommodate the DOL's concerns. ACLI described those concerns as including:

> [A] serious concern that any broad exemption of insurance company general account operations from ERISA should not leave employee benefit plans without a federal right to seek consequential damages in the event of an insurance company's commission of fraud or an insurance company's abuse of its discretion to unilaterally amend or otherwise modify the provisions of its contracts. Additionally, the staff has implied that its willingness to support a broad based exclusion of general account assets from 'plan assets' status might be conditioned upon the application of a prudence standard to an insurance company's investment of consideration under a general account contract to the extent that the contractholder participates in the company's investment experience.[65]

However, even ACLI's attempts to obtain modified legislative relief encountered insurmountable congressional resistance.[66]

[64] *See, e.g.*, *Jacobson v. John Hancock Mutual Life Ins. Co.*, 655 F.Supp. 1290, withdrawn pursuant to settlement, 662 F.Supp. 1103 (D. Conn. 1987).

[65] ACLI Memorandum regarding Description of Modified ERISA Legislation, dated June 28, 1985. Append. A-88-89. Such a prudence standard is essential for contract holders, like Harris Trust, who clearly participate in the investment experience of Hancock.

[66] ACLI Memorandum, dated October 9, 1985. Append. A-94-95.

Consequently, by March 1986, ACLI conceded that any attempt to obtain "comprehensive general account" legislation should be put on hold.[67]

As the above history discloses, contrary to its current claim, since enactment of ERISA and the issuance of IB 75-2, the industry has *not* conducted its affairs confident in the belief that ERISA did not reach general account assets. To the contrary, the industry has been engaged in an almost continual effort to obtain a real exemption from ERISA scrutiny of those assets, knowing from the beginning how precarious its current position has been. There are no settled expectations here because the law has never provided a wholesale exemption for general account assets and the regulators have always been ambivalent at best and hostile at worst to the industry's entreaties in this regard. Indeed, with the opportunities presented by an almost twenty year transition period, the insurance industry should be well prepared to deal with the dislocations that have been a natural part of adaptation to ERISA's requirements for all other segments of the economy.

[67] ACLI Memorandum, dated March 4, 1986. Append. A-109.

CONCLUSION

For the reasons set forth above, the Western Conference of Teamsters Pension Trust Fund respectfully urges the Court to affirm the decision of the court below, apply the exception under Section 401(b)(2) narrowly, and hold that, to the extent a plan can share in the variable experience of an insurance company general account pursuant to an insurance contract or policy, the insurance company is acting as an ERISA fiduciary.

Respectfully submitted, July 9, 1993.

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APPENDIX A

MINUTES OF THE MEETINGS OF THE PENSION COMMITTEE HELD AT THE ALIA OFFICES, WASHINGTON, D.C., ON SEPTEMBER 18 AND 19 AND OCTOBER 2, 1974

The meetings were convened at 1:30 p.m. on September 18 and continued on September 19 and October 2.

The following members were present at one or more of these sessions:

Doug Hunter, *Chairman*	John McCoy
Verne Arends	Robert Pease
Larry Brossman	William Prouty
Frank David	Gerald Randall
Richard Higgins	Donald Willard
A. Charles Howell	John Williams
Dave Hurd	

The following members were unable to attend:

Edward Blakesiee	Daniel Kubik
Harry Bubb	Richard McLoughlin
Howard Hennington	

Others present were:

Harry Blair — Metropolitan
Lawrence Brown, Jr. — Provident Mutual
George Burke, Jr. — Mass Mutual
A. Donald Champagne — Aetna Life & Casualty
Douglas Clark — Connecticut Mutual
Bill Culningham — Pacific Mutual
Edward DeGroff — Connecticut Mutual
Grace Dillingham — ALIA
Joseph Garner — Mass Mutual
William Gibb — ALIA
Herbert Gindlin — Home Life
William Heller — TLAA_CREF
W. Holmes — Aetna Life & Casualty
William Hust — Travelers
Steve Kraus — ALIA
Bob Mallory — Connecticut General
Al Moses — Connecticut General
Bruce Nickerson — ALIA

Carl Ohman — Equitable Life Assurance
Donald Pond — Connecticut Mutual
George Powell — Prudential
Jeanne Cullinan Ray — MONY
Tom Shea — Connecticut General
John Stiefel — Aetna Life & Casualty
Thomas Sullivan — Aetna Life & Casualty
Christopher Wain — Prudential
Bill Wellette — Connecticut General

The primary purpose of the meetings was to receive and act on the reports of the Committee's five task forces which had been reviewing the provisions of the newly enacted "Employee Retirement Income Security Act of 1974". In each case, the task force report set forth problem areas raised by the new law which the task force believed were in need of resolution by Government regulations or rulings and, where appropriate, the task force suggested solutions. On the basis of the recommendations in these reports and suggestions raised by Committee members, the Committee decided on those issues which should be raised by the ALIA as first priority items and instructed the staff to take appropriate action to bring these matters to the attention of the appropriate Government personnel charged with writing the regulations under the new law.

The following is the action taken by the Committee on each task force report:

I. <u>Report of Task Force No. 1—Eligibility and Vesting.</u>

Don Willard (Chairman) presented the Task Force Report (a copy of which is attached to these minutes). The following action was taken by the Committee:

(A) <u>Comment I of Task Force Report.</u> The Committee agreed with the suggestion in substance and decided that a regulation should be sought indicating that a plan may defer an employee's eligibility for ancillary benefits under a plan (such as a life insurance protection) beyond the age and service limitations set forth in the new law as the general eligibility requirements for pension coverage.

(B) Comments II, IV and V. The Committee agreed with the recommendations of the Task Force contained in these comments and decided that appropriate regulations should be sought.

In addition to the matters raised by the Task Force, the Committee decided that the following items should be covered by early regulations:

(1) It should be made clear that the new rules defining the amount of "accrued benefits" which must be payable to a terminated employee with vested rights are not applicable to an employee who terminated service before the effective date of the new vesting provisions.

(2) The regulations should clearly delineate the type of benefits that are subject to the new vesting standards. For example, the regulations should make clear whether a plan must vest a benefit in excess of the value of a straight life annuity—i.e., a term certain feature or a spouse's benefit payable on death after retirement.

II. Report of Task Force No. 2—Funding.

Charles Howell (Chairman) presented the report of the Task Force (a copy of which is attached to these minutes). Mr. Howell noted that the Report was intended as a more or less comprehensive listing of areas where Government clarification would eventually be needed, but that only certain of the items seemed to call for immediate action.

The Committee decided that the following items in the Report should be presented by the ALIA as first priority matters for regulations:

(A) Definition of "Current Value" (pp. 3-5 of the Task Force Report). The Committee, in agreeing with the basic Task Force recommendations, decided to request a regulation indicating that:

(1) For a wholly or partially insured plan, the insurance or annuity contracts (and not the insurance company's underlying

assets) will be considered as plan assets for funding purposes; and

(2) The value of such contracts will be determined by the actuary under any reasonable actuarial method.

(B) Acceptable Actuarial Cost Methods (pp. 5-6 of Task Force Report). The Committee agreed with this recommendation relating to the allowance of terminal or pay-as-you-go funding for certain incidental benefits (such as disability benefits). Mr. Howell was asked to compile a list of the type of benefits that would be included in the "incidental" category for use in discussing this matter with the Government, although it was agreed that it would be preferable, for regulation purposes, to define the benefits covered in the incidental category in terms of a percentage of total plan costs rather than attempting to list them benefit-by-benefit.

(C) Exclusion From Funding Requirements for Certain Insured Plans (pp. 7-9 of Task Force Report). The Committee agreed to request regulations on the following two matters discussed in this section of the Task Force Report, which generally relates to the statutory exclusion from the funding requirements for plans funded exclusively by level premium individual policies or by group insurance contracts having the same characteristics:

(1) A more precise definition of the group contracts that will qualify for the exclusion. Jeanne Ray (MONY) and Dave Hurd (Bankers of Iowa) were asked to draw up a draft of such a regulation.

(2) A provision indicating that a so-called flexible premium contact, under which additional benefits may be purchased with a step_up in the premium on a level basis, qualifies as a level premium policy for purposes of the above-cited statutory exclusion. It was noted that the use of such a policy is substantially the equivalent of funding additional benefits (for example, those resulting from an increase in compensation) through the purchase of additional level premium policies, which clearly qualify for the exclusion.

III. Report of Task Force No. 3—Disclosure and Fiduciary Standards.

Frank David (Chairman) presented the Report of the Task Force (a copy of which is attached to these minutes). The following

action was taken by the Committee on the various recommendations in the Report.

(A) Reporting and Disclosure (Section I of the Report).

(1) Item 1(a) relating to method for reporting benefits purchased from an insurance company on the plan's financial statement. The Committee adopted the recommendations included in a Supplementary Report of the Task Force presented at the October 2 meeting (a copy of which is attached to the Task Force Report) which was prepared as a result of Committee discussion on September 18.

(2) Item 1(b) regarding the valuation of insurance contracts. The Committee decided that a regulation should be sought adopting the same valuation rules as are being proposed under the funding provisions (see Item II (A)).

(3) Item 1(c) relating to the reporting requirements that should be applicable to fully insured plans. The Committee agreed with the Task Force that fully insured plans should be exempted from a number of the reporting requirements, and requested the staff to work to this end in discussions with the Labor Department recognizing that the specific rules will depend to a great extent on the approach being taken by the Department in developing new reporting forms.

(4) Item 2 relating to the reporting requirements for Welfare Benefit Plans. It was reported that this matter would be considered by a task force of the ALIA Group Committee. [Note: Subsequent to the meetings, such a Task Force was appointed, comprised of George F. Hockney (John Hancock), Richard J. Mellman (Prudential), and H. Morgan Spencer, Jr. (Travelers).]

(5) Items 3, 4, 6, 7, 8, 9 and 10. The Committee agreed that the recommendations set forth in these items should be presented to the Government.

(6) Item 5 relating to designation of an enrolled actuary for insured plans. The Committee decided that this matter should more appropriately be dealt with by the actuarial organizations.

(B) Fiduciary Standards

(1) Item I — Definition of Fiduciary. The Committee considered both the report of the task force, and a report of a supplementary task force (chaired by Larry Brossman) which had been formed to focus particularly on the possible impact of the new fiduciary provisions on insurance companies and agents resulting from their activities in connection with the installation and servicing of retirement plans. (The report of the supplementary task force was distributed to the Committee.)

After considerable discussion, the Committee decided that the ALIA should request the Labor and Treasury Departments to take immediate action to make clear that the new law is not intended to disrupt the normal business activities of insurance agents (including the receipt of commissions). To this end, it was agreed that the following two specific administrative regulations or rulings should be sought:

(a) That the offering of a product or alternate products of a life insurance company or companies and related affiliates for sale by an agent or broker (whether or not offered with products of other funding media) does not constitute the giving of investment advice (so as to classify such an agent or broker as a "fiduciary" within the meaning of section 3(21)(A) of the new law) provided the agent or broker makes known that he will receive compensation for the sale of such product or products.

(b) That the receipt of commissions under normal insurance company compensation schedules by an agent or broker who is considered a plan fiduciary shall not constitute a prohibited transaction, provided that full disclosure of such commission payments is made to the employer or plan trustee.

It was left to the discretion of staff to determine the most feasible way to obtain these results (i.e., by regulation or perhaps partially by regulation and partially special exemption). A task force, consisting of Don Champagne, Chairman, (Aetna), Joe Garner (Mass Mutual) and Jim Wilson (New England Life), was appointed to prepare the

submission on item (b) above, relating to the receipt of commissions by agent-fiduciaries.

(2) Item 2 — Treatment of an insurance company's general account as "plan assets". Under section 401 (b)(2) of the new law, the assets of a life insurance company underlying an insurance contract issued to an employee benefit plan are to be considered as assets of the plan, except if the contract "provides for benefits the amount of which is guaranteed by the insurer". While it is clear that assets in a separate account would be treated as "plan assets" under this provision, it was agreed that it is not clear what types of policies based on the general account (if any) would cause general account assets to be similarly treated. However, if it is eventually decided that at least some types of policies would have this effect, it was the overwhelming consensus of the Committee that treating general account assets as "plan assets" in these situations would severely disrupt the investment operations of life insurance companies. This would result primarily from the fact that, under the prohibited transaction rules, the life insurance company would be prohibited from dealing with respect to the general account assets with any person connected with an employee benefit plan holding such a policy. For example, under these restrictions, the insurance company could not lend moneys to an employer corporation with such a plan underwritten by the company.

In view of these potential problems the Committee decided that the ALIA should seek a general ruling under the applicable provisions of the bill exempting the general account assets of an insurance company from the prohibited transaction rules. The Committee decided that this approach would be preferable to arguing that all policies are "guaranteed benefit" policies. In this regard, it was agreed that the requested exemption should also cover transactions of a commingled separate account with parties in interest with respect to an employee benefit plan whose interest in the commingled account does not exceed 10 percent of the total account. (See Item 6 of the Task Force Report.)

(3) Items 3, 7 and 8. The Committee adopted the Task Force recommendations contained in these items.

(4) Items 4 and 5. The Committee decided that no immediate action was necessary on these items.

IV. Report of Task Force No. 5 — Plan Termination Insurance and Miscellaneous.

Dave Hurd (Chairman) presented the Report of the Task Force (a copy of which is attached to these minutes). He explained that the Report was intended as a more or less comprehensive listing of problem areas, with the idea that not all of them required immediate ALIA action.

The Committee agreed that the recommendations contained in the following sections of the Report should be presented by the ALIA to the regulations writers:

(A) Joint and Survivor Annuity Provisions

(1) Section 205(a) (Page 2 of the Report) — It was decided to limit this recommendation (which relates to the requirement for explaining to employees the joint and survivor annuity provisions in the case of plans where an annuity form of payment is merely an option and not the regular form of distribution) to profit_sharing and thrift plans.

(2) Section 205(b) and (c) (Page 2 of the Report)

(3) Section 205(c)(1) (Page 3 of the Report)

(4) Section 205(e) (Page 4 of the Report) The Committee agreed with the substance of this recommendation which would permit a plan to require a lead time between the making of an election out of a joint and survivor annuity and its taking effect. However, as to specifics, it was decided that the ALIA should limit its request to a regulation which would allow a plan to provide that the election will not become effective for a specified period after it is made, not to exceed two years, and, in any event, must be made two years prior to normal retirement age.

(5) Section 205(g)(3) (Page 5 of the Report)

(6) Section 205(h) (Page 5 of the Report)

(7) As an additional item it was agreed that a regulation should be requested indicating that a plan will be considered as meeting the new pre-retirement survivor annuity requirement if it provides a spouse's benefit equal to at least a specified percent (perhaps 35 percent) of the employee's accrued benefit as of the time of death. Under such a provision, it would not be necessary to verify the actuarial value of the benefit at each age level. The specific percentage figure to be recommended will be such as will insure that the spouse's benefit will at least meet the statutory requirement in substantially all situations.

(B) Plan Termination Insurance

(1) Section 4006(a)(3) (Page 6 of the Report) While agreeing with the substance of this recommendation, which is aimed at simplifying the computation of the amount of the plan termination insurance premium, the Committee authorized staff to explore various alternatives with the Labor Department if the basic recommendation is not acceptable.

(2) Section 4006(a)(6) (Page 6 of the Report)

(3) Section 4041 (Page 9 of the Report)

V. Report of Task Force No. 4 — Tax Provisions.

Al Moses (Chairman) presented the report (including a supplemental report) of the Task Force (a copy of which is attached to these minutes). He explained that the Report was intended as a more or less comprehensive listing of problem areas, with the idea that not all of them required immediate ALIA action.

The Committee agreed that the recommendations contained in the following items of the report should be presented by the ALIA to the regulations writers:

Items 2, 6, 8, 11, 17, 21, 25 and 26.

With respect to item 13, relating to the method for valuing annuities under the lump-sum distribution provisions, it was agreed that the ALIA should offer to work with the IRS in developing regulations instead of initially proposing rules. It was felt that this approach would offer the maximum flexibility.

With respect to item 14, relating to the method for determining how fractional years are to be counted for purposes of applying the proration computation under the lump-sum distribution rules, it was agreed that the staff should emphasize the necessity for a simple rule (and offer various alternatives) instead of advocating only one particular approach as suggested in the report.

It was agreed that item 18, relating to clarification of the effective date of the new benefit limitations on corporate plans, should be handled informally with the IRS staff.

The meetings were adjourned at 5:00 p.m. on October 2.

MINUTES OF THE MEETINGS OF THE COUNCIL'S PENSION COMMITTEE HELD AT THE COUNCIL'S OFFICES, WASHINGTON, D.C., ON SEPTEMBER 16, 1976

The meeting was convened at 9:45 a.m.

The following members were present:

Douglas B. Hunter, Chairman	G. David Hurd
Verne J. Arends	Harold G. Ingrham, Jr.
Edward Blakeslee	John S. McCoy
Larry A. Brossman	Richard W. McLaughlin
Gilbert F. Cronin	Robert W. Pease
Frank H. David	William C. Prouty
Harrison Givens, Jr.	Gerald J. Randall
Richard C. Higgins	Donald S. Willard,
A. Charles Howell	TLAA-CREF

The following members were unable to attend:

Glenn A. Mateja	John R. Williams

Others presents during all or part of the meeting were:

Lawrence R. Brown, Jr., Provident Mutual
George P. Burke, Jr., Mass Mutual
Harold Burke, IDS Life
Doug Clark, Connecticut Mutual
Arthur Fefferman, ACLI
Jack Forsythe, ACLI
Joseph Garner, Mass Mutual
William T. Gibb, ACLI
Bill Heller, TIAA-CREF
Bill Holmes, Aetna
John Jacobus, Equitable
John Joyce, State Mutual
Charles Kannel, New England Life
Steve Kraus, ACLI
Gordon MacKay, New England Life
Ken Maher, Aetna
Paul Mason, ACLI
Carl Meier, Bankers Life
Bruce Nickerson, ACLI
G. Robert O'Brien, Connecticut Genral
Ilbert Phillips, Occidental Life

Donald Pond, Connecticut Mutual
Jeanne Ray, MONY
Larry Rosenstein, ACLI
Gerald H. Sherman, AALU-NALU
Morgan Spencer, Travelers
Gerry Talbot, Metropolitan
Alfred A. Tucro, Phoenix Mutual
Chris Wain, Prudential
W. E. Wellette, Connecticut General
Kenneth White, ACLI
Stuart Yoffe, John Hancock

Legislative Program

Background. The Committee agreed that the implementation of the wide-sweeping provisions of ERISA has raised innumerable problems for the employee benefit plan community, including life insurance companies and their customers. Although the Council has addressed many of these issues at the Labor Department and Internal Revenue Service level, the Government Departments have been slow to react, not only to our problems, but also to those of employee benefit plans generally.

In this regard, the Committee agreed that ERISA provides at least some temporary protection in the fiduciary area (where most of the serious issues have arisen) through a limited grandfather clause, which is scheduled to expire on June 30, 1977. Some members noted that the coverage of this grandfather clause is, at best, debatable in some areas and, therefore, an extension should not be relied upon as a satisfactory solution.

In any event, in view of the imminence of the expiration date, particularly in the context of legislative possibilities, the Committee decided that it was imperative that the Council inventory the unresolved issues facing the life insurance business for the purpose of determining those which are of a "life and death" nature and decide on a course of action to resolve them.

To this end, each of the Committee's Task Forces had been requested to sort out the issues within its sphere, assign them

priorities, and where appropriate develop specific legislative language to resolve them.

Recommendations. The Committee received the reports from the Task Forces and, following discussion of the various recommendations, identified a series of proposals which it unanimously recommended form the basis for a Council Federal legislative program to be initiated as soon as possible consistent with regulatory developments. The proposed legislative package would have two basic components—

(1) An extension of the June 30, 1977, expiration date for the grandfather clause to December 31, 1979; coupled with

(2) Substantive legislative solutions to a series of problems.

This two-pronged approach was adopted in recognition of the belief by the Committee that, realistically, an extension is all that can be hoped for by mid-year (i.e., when the grandfather clause will expire). The Committee emphasized that the extension is not, however, a solution in itself, but should be considered as only a necessary prelude to provide time for the substantive solutions.

As for its substantive legislative package, the Committee recommended that the Council seek amendments to ERISA as follows (in each case, a short statement of the current status of the issue is included):

(a) Commissions and Services. The fiduciary provisions would be amended so as to permit an agent or broker to sell insurance company productsáor securities to an employee benefit plan and receive a commission therefore, notwithstanding his status as a party-in-interest or fiduciary to the plan. This would be accomplished through a series of three amendments to ERISA —

(i) Elimination of mere service providers from the category of persons who are considered parties-in-interest.

(ii) Permit fiduciaries (who are not insiders) to have multiple relationships with a plan (e.g., perform services, sell property, etc.) so long as such relationships are authorized by an independent fiduciary or the plan sponsor.

iii)Permit fiduciaries who are licensed life insurance or securities salesmen (and are not insiders) to represent an insurance company or other person in the sale of life insurance or securities to a plan and receive commissions therefor, subject to disclosure requirements and authorization of the purchase by an independent fiduciary or the plan sponsor.

Current Status: The Council, together with the AALU and the NALU, has an exemption application pending with the Labor Department and Internal Revenue Service which, if adopted, would permit agents and brokers of life insurance companies (other than "insiders") to sell insurance company products to an employee benefit plan, and receive commissions, despite their party-in-interest or fiduciary status. (It was reported that an amendment to the application was in the process of being filed to make clear that the exemption applies to nonfiduciary parties-in-interest.) Although the Council has been promised at least preliminary action early this fall, nothing definitive has happened yet. These transactions are, by administrative interpretation, presently covered, to a significant degree, by the grandfather clause.

(b) Selling vs. Investment Advice. The definition of "fiduciary" would be amended so as to make clear that selling activities, in connection with the marketing of insurance company products and securities, are not to be categorized as fiduciary activities (e.g., rendering investment advice).

Current Status: The Council, in conjunction with the AALU and NALU, has submitted to the Labor Department and IRS a request for an amendment to the regulations to reach this result for insurance company products. This project is joined with the exemption request described in item (a) above.

(c) Plan Assets. The fiduciary provisions would be amended to provide that:

(i) The assets in an insurance company's general asset account will not be considered "plan assets", and the insurance company, thus, will not be considered a plan fiduciary by reason of

managing those assets, for any employee benefit plan holding contracts based on that account. The Committee decided against a Task Force recommendation that the legislation nevertheless allow the employee benefit plan to designate the insurance company as investment manager.

(ii) The assets in an insurance company's pooled separate account will not be considered "plan assets" except for employee benefit plans with a substantial interest in that account.

Current Status: The Labor Department and Internal Revenue Service have, in response to petitions by the Council and others, issued interpretative bulletins holding that general account assets are not "plan assets". The legislative amendment would codify this ruling—a move which was thought desirable by the Committee in light of the questionable rationale of the Government ruling and the contention by some employers that it may not withstand a legal challenge. It was noted that an IRS/Labor Department exemption, although legally more reliable, can deal only with the prohibited transaction provisions and not the general fiduciary status of the life insurance company.

On the separate account issue, the Council has an exemption application pending with the Labor Department and Internal Revenue Service, with indications that favorable action may be imminent. (It was noted that an amendment has recently been filed by the Council to meet objections raised by the Government staffs.) In this regard, it was noted that an exemption granted under the procedures established by ERISA does not carry the legal uncertainties associated with a ruling or regulation.

(d) New General Limitations. Although proposed regulations have not yet been published, it was reported that several issues have surfaced in connection with the IRS's implementation of the new overall limitations imposed by ERISA on the contributions or benefits that can be provided under qualified plans (section 415 of the Internal Revenue Code). The initial focus has been on master/prototype plans where the IRS is attempting to require various provisions in this area as a condition to granting approval.

To cure the most objectionable of these problems, the new limitation provisions would be amended —

(i) To make clear that the limitations (i.e., annual contributions to a defined contribution plan cannot exceed 25 percent of earned income, with a $25,000 maximum) are to be applied on an annual basis, and not cumulatively as each intra year contribution is made;

(ii) To provide that contributions, which turn out to be in excess of the limitations, may be returned in a reasonable period without penalty; and

(iii) To make clear that contributions for a year, which are made within the statutory grace period after the close of the year, are subject to the limitations for the year to which they relate.

Current Status: These issues are all in contest with the IRS, and the Council has endorsed a memorandum filed by two member companies on them. It appears that each of these issues can be solved at the IRS level, if the IRS is so inclined.

Discretion in Case of Administrative Action. The Pension Committee expressed its strong desire that the Council staff continue to vigorously pursue solutions to the above-described problems at the Labor/IRS level where appropriate. Moreover, it was recognized that timely administrative action may make legislation unnecessary in some, or possibly most, cases. Thus, the Committee recommended that the Chairman, in consultation with the appropriate Task Force Chairmen and Council staff, be given the discretion to modify the legislative program to reflect the current administrative situation on particular issues.

The Committee also requested the Task Forces to continue the process of developing and refining the specific statutory details and drafts of the agreed on proposals.

Other Issues. The Committee discussed at considerable length a recommendation that the Council's legislative package include an amendment to the Individual Retirement Account (IRA) provisions

to allow an individual to continue, on a non-tax preferred basis, to pay premiums on an IRA endowment contract after he loses his eligibility to participate in the IRA program. It was pointed out that under the present law, an individual may have to lapse his IRA endowment contract when he becomes ineligible to continue his IRA plan and that this would be particularly harsh in the early years of the contract. While acknowledging the defects of present law, several members were of the opinion that a legislative program on this matter at this time could produce a significant adverse reaction to some of the products being sold in the IRA market and, thus, might lead to restrictive legislation. Following the discussion, the Committee voted 9-6 against including this item in the legislative package.

It was reported that considerable pressure is beginning to build, even within the Government, for eliminating the areas of dual jurisdiction (Labor and IRS) created by ERISA. The Committee agreed that this dual jurisdiction is a significant factor in the delays that have resulted in implementing ERISA. On the other hand, the Committee recognized the political hazards inherent in backing one Department as against another. Following discussion, the Committee decided to take no position at this time, pending a clearer indication of possible solutions and the legislative climate. It was agreed that it would be most desirable if the lead on resolving this matter was taken by the Government.

The Committee recognized that there are other significant, but not "life and death", issues on which legislation should be sought if the opportunity arises, for example, a broadly sponsored ERISA bill is taken up in Congress. It requested the Staff and Task Forces to catalogue these issues for consideration by the Committee in the future.

Other New Business

Multiple Service Proposed Regulations. It was reported that the Labor Department and IRS had issued proposed regulations implementing several provisions of ERISA relating to the providing of services to a plan by a party-in-interest (including a fiduciary). The Committee was of the opinion that the basic framework of these proposed regulations represents a satisfactory solution to the multiple

service issues facing the life insurance business. However, it was agreed that several perfecting suggestions should be filed by the Council. [Comments were filed by the Council on September 23, 1976. See General Bulletin 2318.] Moreover, it was the clear consensus of the Committee that these proposed regulations do not, and are not intended to, deal with the ERISA problems involved in the sale of insurance company products to an employee benefit plan by an agent or broker who a party-in-interest, and the receipt of the commissions associated therewith. Thus, it was agreed that the Council's efforts on this matter at the administrative and possibly legislative levels must continue.

Joint and Survivor Provisions. It was reported that the Committee had been requested by Security Life of Denver to advocate certain positions as regards the application of ERISA's pre-retirement survivor annuity provisions. The request was referred to Task Force No. 6 for recommendations.

Reports

Individual Retirement Accounts. It was reported that the Internal Revenue Service has issued proposed regulations relating to disclosure statements for individual retirement accounts and annuities and that the requirements in these proposed regulations were much stricter than those in the temporary regulations which were issued last November and are presently in effect. The Committee was informed that the Council had filed comments regarding the proposed regulations with the IRS and that Chris Wain, Prudential, had testified on behalf of the Council at the public hearing regarding the proposed regulations. At the public hearing, the Council objected particularly to the elimination of the 7-day free look as an alternative to advance disclosure and to the requirement that sales commissions be disclosed. The Committee was further informed that the Subcommittee on Oversight of the Committee on Ways and Means was planning to hold a hearing on the subject of IRA disclosure and marketing and that the Council was invited to participate in order to describe the types of insurance and annuity contracts our member companies are marketing to fund individual retirement account programs. [The hearing was held on September 21, 1976, and Richard Minck, Chief Actuary, testified for the Council.]

It was also reported that the Tax Reform Bill pending in Congress contains two provisions that will affect IRA's. The first provision would increase, to $1750, the maximum IRA deduction for a family with an eligible worker and a non-employed spouse. The second provision will allow a survivor's interest in an IRA or an H.R. 10 plan to be excluded from a decedent's gross estate.

Finally, the Committee was informed that the Council had written a letter to the IRS requesting a modification of its reporting forms and procedures to recognize the fact that there will inevitably be some discrepancies between the amount of IRA contributions reported as having been received during a year by an insurance company (Form 5498) and the amount claimed as a deduction by the taxpayers (Form 5329). It was suggested to the IRS that a reconciling statement prepared by the taxpayer, with adequate substantiation, be accepted in the same manner as if the Forms 5498 and 5329 were in agreement.

Plan Approvals. It was reported that even though the Special Reliance Procedure expires September 30, the Service still maintains the position that Target Benefit Plans cannot be filed for approval. The Committee was informed that the problem has been discussed with an IRS representative, who apparently understands the problem and will attempt to solve it quickly.

A problem was raised concerning the amendment of defined benefit Subchapter S plans to conform to ERISA. It was suggested that the IRS extend the time limitations of the Special Reliance Procedure for these plans or issue regulations under section 401(j). The problem was assigned to Task Force No. 6 for consideration.

Guaranteed Interest Contracts. The Committee was informed that representatives of the Council were actively discussing the treatment of guaranteed interest contracts with the staff of the SEC. It was reported that the Council was attempting to obtain administrative relief from the Securities Laws but that a quick response was not likely. The Committee was further informed that legislative relief was not possible in this session of Congress.

The Committee also received a report by Charles Howell, Chairman of the Task Force on Actuarial Aspects of Valuation Problems. Mr. Howell reported that a draft proposal of the Task Force and the Council Actuarial Committee to increase the statutory valuation interest rates had been presented to the NAIC Technical Task Force on Valuation and Nonforfeiture Value Regulation at its meeting on August 18-19. The proposal, which would reduce required pension reserves for new business, had been favorably received by the NAIC Task Force. Specifically, it would increase the statutory valuation interest rate for newly purchased group annuities and single premium individual immediate annuities, for newly issued individual deferred annuities, and for newly issued life insurance. In addition to reducing required reserves for new business, the proposal would change the valuation standard for all group annuities purchased prior to the operative date of the NAIC 1972 Amendments to the Standard Valuation Law. At least one company was reported opposing this later change on the grounds that it would set a precedent for changing the minimum valuation standards for existing business. [At a subsequent meeting on September 21, the Council Actuarial Committee reversed its earlier decision on this part of the proposal and voted not to support any change in statutory standards for group annuities which are already in force.]

Pension Benefit Guaranty Corporation. The Committee was informed that the PBGC had developed draft specifications to be used in developing the regulations regarding the valuation of insurance contracts in terminating pension plans. It was reported that the draft specifications follow most of the Council's recommendations in this area. The Committee was further informed that Council representatives will shortly be meeting with the staff of PBGC to discuss these specifications, based on comments received from several members of the Committee.

It was further reported that the PBGC had modified its regulations governing the payment of premiums by adopting the "snapshot" approach (count participants as of the last day of the prior plan year) for computing the number of plan participants for premium payment purposes. Also, the PBGC modified the definition of "participant" to exclude a former employer with vested rights to immediate or

deferred benefits or a retiree who is receiving or is eligible to receive benefits from the plan if an insurance company has made an irrevocable commitment to pay the benefits to which the individual is entitled under the plan.

Labor Department Advisory Council. It was reported that the Advisory Council was considering whether it should recommend to the Labor Department that the requirement of Schedule A (Form 5500) that commissions be disclosed be eliminated. It was further reported that the Advisory Council has taken the position that the Labor Department's hours of service regulations are part of the Special Reliance Procedure and that it planned to tell the IRS that they should be so treated.

Reporting and Disclosure. The Committee was informed that there is still some confusion regarding the status of tax-sheltered annuities (section 403(b) plans) under ERISA. The Committee was advised by Doug Clark (Connect. Mutual) that the Labor Department is trying to develop rules for determining when a section 403(b) plan is not an employee benefit plan for reporting purposes. A similar issue is involved in IRA Plans. Mr. Clark was asked to represent the Committee in advising the Labor Department of the usual factual patterns, both the 403(b)plans and employer sponsored IRA's.

The Committee was further informed that various groups were working on simplifying the reporting requirements of ERISA. In this regard, the Committee was advised that Verne Arends had represented the Council at a hearing held by the Commission on Federal Paperwork. The Commission was advised of the tremendous increase in paperwork generated by ERISA and indicated that it would take action to try to ease the paperwork burden.

The next meeting was scheduled for November 16, 1976. The meeting was adjourned at 5:30 p.m.

MINUTES OF THE MEETINGS OF THE PENSION COMMITTEE HELD AT THE COUNCIL'S OFFICES, WASHINGTON, D.C., ON OCTOBER 16, 1979

The meeting convened at 9:30 a.m.

The following members were present:

G. D. Hurd, Chairman
William L. Cassidy
Gilbert F. Cronin
William Cunningham
Frank H. David
Joseph P. Garner
Harrison Givens, Jr.
Kenneth P. Hinsdale
Harold G. Ingraham, Jr.
Richard W. McLaughlin
William C. Prouty
Jeanne Cullinan Ray
Barry L. Shemin
Donald S. Willard
John R. Williams

The following members were unable to attend:

Larry A. Brossman
Marvin A. Levins
Stewart G. Nagler
Gerald J. Randall
Robert Shapiro
Dean A. Wahlberg

Others present were:

Melvin S. Altman, Equitable
Gerard M. Brannon, Council
George P. Burke, Jr., Massachusetts Mutual
Harold Burke, IDS Life
Chester Crabtree, Connecticut General
Ted Fleron, Insurance Company of North American
William T. Gibb, Council
William Heller, TIAA
John Jacobus, Equitable
Stephen W. Kraus, Council
Richard V. Minck, Council
Gregg Narber, Bankers Life
Ilbert Phillips, Council
Donald Pond, Connecticut Mutual
Francis X. Roche, New England Life
Gerard J. Talbot, Metropolitan
Chris Wain, Prudential
Judith Wolfson, Connecticut General

Report of Task Force on Fiduciary Matters

Gerard Talbot, Chairman, reported that the Task Force had met on September 14, 1979—a copy of the report regarding that meeting had been furnished to Committee members prior to this meeting—and on October 15, 1979. Mr. Talbot indicated that the Task Force had discussed (1) at the September 14 meeting, unfinished business with respect to obtaining ERISA prohibited transaction exemptions that the life insurance business needs and (2) at both the September 14 and October 15 meetings, proposed ERISA regulations relating to the definition of plan assets and the establishment of trusts to hold plan assets.

Mr. Talbot indicated that the Task Force reviewed an application for an ERISA prohibited transaction exemption filed by the firm of Groom and Nordberg on behalf of certain member company clients—which would allow insurance companies under certain circumstances to have discretionary authority to invest plan assets in (or transfer them between) various separate accounts and/or advisory accounts maintained or managed by that insurer without violating ERISA's prohibited transaction rules. The filing does not, however, request an exemption for the discretionary movement of funds by an insurance company between the general asset account and a separate account.

Mr. Talbot reported that the Council, pursuant to a Task Force recommendation and previous Committee approval, will also file an application—which parallels the previously mentioned application—for an ERISA prohibited transaction exemption for discretionary asset management.

Mr. Talbot also reported that the Task Force discussed the Department of Labor's (the Department) proposed ERISA regulations relating to the definition of plan assets and the establishment of trusts to hold plan assets and developed a proposed position for the Council to take on those proposed regulations: That position is as follows:

— The regulations should be revised to make clear that, in the case of a plan funded with a contract or policy of insurance, plan assets do not include the underlying assets in the insurance company's general account, whether or not the contract insures plan benefits. Also, a possible negative inference should be removed (by eliminating the "notwithstanding" clause in section 2550.401b-1(d)) to the effect that "plan assets may arise in the general account if the contract does not technically qualify as "contract or policy of insurance".

— The regulations should make clear that the underlying assets of an equity interest in a partnership which develops or manages real estate should fall under the "operating company exemption" of the proposed regulations and, thus, should not be considered plan assets. If no relief is given, one can expect a reduction in real estate joint ventures between separate accounts and other persons because of the spectre of "fiduciary" status for the other persons. If the operating company exemption is not expanded to include the partnerships described above, the Department should be asked to at least exempt certain existing real estate partnerships from the new rules.

— The regulations should make clear that property securing a debt is not a plan asset. This would avoid the inference that beneficial ownership by a plan in such property makes such property a plan asset.

— The regulations should provide that employee contributions are not to be considered plan assets until they are paid over to a trust or insurance company, subject to a "reasonable" rule of three months. The proposed regulations take the position that employee contributions are plan assets when withheld from the employee's paycheck. There was discussion by the Committee on a variety of possible approaches the Council could take in dealing with this issue. Mr. Talbot stated that the question of when an item becomes a plan asset also directly relates to the issue of when a trust has to be established to hold that plan asset or when the item must be paid over to the insurance company. The Committee generally agreed that a "reasonable period of time" is needed for the employer to perform the functions necessary to compute

and pay over employee contributions and that a three week period is such a "reasonable period" that the Council should seek.

Finally, Mr. Talbot reported that the written report, submitted to the Committee prior to this meeting, contained recommendations regarding additional ERISA prohibited transaction exemptions the life insurance business needs and which should be requested by the Council (a copy of that portion of the report relating to those recommendations is attached to these minutes). There were no questions concerning these recommendations.

The Committee unanimously adopted the report and recommendations of the Task Force.

Report of the Task Force on Small Cases

Frank Roche, Chairman, reported that the Task Force had met on October 9, 1979 and was now seeking approval of the actions taken at that meeting. He indicated that the purpose of the meeting was to develop recommendations for incentives for encouraging employers to establish pension plans, including a suitable legislative approach (via S.209's Special Master Plan program) to permitting corporate employers to adopt certain master/prototype plans, and to operate such plans, without threat of IRS retroactive disqualification.

Mr. Roche reported that the recommendations which follow were developed at that meeting; and that the Task Force would continue to explore other recommendations, particularly, tax incentives.

(1) Improvement of Target Benefit Plan Benefit Limitations: Target benefit (or assumed benefit) plans should be subject to the defined benefit plan benefit limitations of Internal Revenue Code section 415 rather than, as at present, the Code section 415 limitation on contributions for defined contribution plans. This change would have the advantage of permitting target benefit plans to provide older employees, at the time of the plan's inception, with a benefit which takes into account past service (and thus might not be able to be funded under the annual defined contribution limitation) while retaining the defined contribution plan advantage of excluding the plan

from coverage under the plan termination insurance program. Moreover, the target benefit plan would be able to provide this greater benefit with more predictable costs for the employer than under a defined benefit plan since it is the participant's account balance that determines the actual benefit to be paid; therefore, the level of employer contributions is not subject to the plan's mortality or investment experience. Finally, since the target benefit plan is not a defined benefit plan, no actuarial certification is needed. This combination of factors would make target plans more marketable to small employers and thus contribute to the spread of coverage.

(2) Faster Amortization for Past Service Liabilities: ERISA would be amended to allow employers to fund past service liabilities, with the right to deduct contributions, under pension plans over a period of less than 10 years, rather than being limited to amortizing the liability—with appropriate deductions—no faster than over 10 years as under the current law. Permitting a faster amortization schedule, with deductions, would (i) provide employers with flexibility to match contributions and deductions with profitable years and, thusly, make adoption of a plan more attractive, and (ii) provide plan participants with the security of a more fully funded accrued benefit. Faster funding is a goal of ERISA and should be further encourage.

(3) Special Master Plan Provisions. The Special Master Plan Provisions of S.209 need improvement if they are to really serve as a vehicle for spreading pension coverage. To this end, the Task Force recommended that:

(a) The Council continue to pursue its recommendations presented to the Senate, which primarily involve a more careful delineation of the responsibility of the insurance company sponsor. Basically, such responsibility would be limited to reporting and disclosure.

(b) The Council urge the following additional changes in the S.209 version:

(i) No Retroactive Disqualification: The Special Master Plan should be immune from retroactive disqualification because of discrimination in operation.

(ii) Quinquennial Plan Amendments: A Special Master Plan should have to be amended and recertified only once every five years; consequently, a plan would be able to delay amendments needed in order to comply with new regulations published within five years of the date of the last certification.

(iii) Five Year or 4/40 Vesting: Five year vesting or 4/40 vesting would be a minimum vesting requirement, as a trade-off for the more liberal rules described in (i) and (ii).

After presenting the recommendations, Mr. Roche reported that at the Task Force meeting, a Task Force member reported that preliminary discussions had been held with Congressional staff on possible additional proposals to encourage expansion of plan coverage. The Congressional staff indicated that any such program must be aimed at obtaining rank and file coverage; thus, quicker vesting and no Social Security integration would probably be the price for obtaining staff support for an incentive package. Mr. Roche indicated that the Task Force was of the opinion that "no integration" was too large a price to pay for the package of changes outlined above.

In the discussion of the proposals, one Committee member noted that the funding recommendation (item (2) above) might involve too great a revenue impact—if so, it could be limited to smaller plans by, for example, making it applicable only to contributions below a specified dollar amount.

Mr. Roche then reported that the Task Force had discussed a position the IRS had taken in a private letter ruling. According to the IRS, ERISA requires that dividends from life insurance policies must be treated as actuarial gains—where the policies are being used to fund benefits in split_funded pension plans—and amortized in accordance with the plan's actuarial cost method. Mr. Roche indicated that the John Hancock Company has a request for a class ruling to change the funding method of plans before the IRS and the same issue had arisen. Mr. Roche stated that the Task Force decided that staff should work with the John Hancock in helping to resolve this problem with the IRS.

The Committee unanimously adopted the Task Force's report and recommendations.

PBGC Legislation

Harrison Givens, Chairman of the Task Force on Plan Termination, reported that Congress is presently considering what action to take regarding coverage of multi-employer plans under the pension plan termination program. At present, coverage is provided only on a selective basis. He noted that there are huge potential liabilities which is making a solution very difficult. In this regard, he recommended that the COuncil should support the principles of the legislative proposal developed by the PBGC (S.1076).

Moreover, Mr. Givens emphasized that the Council should take the position that the multi-employer plan termination insurance program should remain separate from the single employer plan termination insurance program since the two programs are different conceptually. He also recommended that the Council oppose any extension of coverage (and, thus, premiums) to other types of plans, e.g., profit-sharing.

In addition to his position on change in ERISA with regard to the plan termination insurance program's treatment of multi-employer plans, Mr. Givens recommended that the Council urge Congress to revise the "employer liability provisions" by: (1) eliminating the single sum settlement concept and replacing it with a requirement that the employer continue to fund his plan on an annual basis; (2) requiring that the post termination funding be geared to vested benefits, instead of guaranteed benefits; (3) eliminating the 30 percent of net worth limitation on the employer's liability; and (4) eliminating the contingent employer liability insurance provisions.

The Committee decided against taking a position on the way to deal with multi-employer plans. However, it approved Mr. Givens' recommendation for changes in the application of the plan termination insurance provisions to single employer plans and emphasized that the present Congressional consideration of the multi-employer plan issues provides a forum for the consideration of the single employer issues. The Committee noted that these recommendations were consistent with existing Council policy as reflected in the "Trial Design" of a plan termination insurance program developed by the Council in the early 1970's.

Report from the Task Force on Long Range Role of Private Pensions

Dave Hurd, Chairman of the Committee, reported that he and the Task Force have been looking into the best way for the Council to obtain basic research in the pension field. As a preface to his recommendation on how to obtain that basic research, Mr. Hurd analogized the public concern with private pensions today to the public's general unease following the Studebaker closing in the early 1960's where the concern was on the loss of pensions. According to Mr. Hurd, that unease in the 60's turned out to be a "gestation" period of discussion of pension problems which led to the enactment of ERISA 10 years later. Mr. Hurd stated that several years ago, the Pension Committee detected a similar unease associated with the extent of private pension coverage which led to the creation of the Long-Range Task Force. Mr. Hurd indicated that the Task Force has recognized (1) the desirability of a single voice to speak for the private pension business, and (2) the Council's need to develop industry positions in relation to public concern about extending pension plan coverage, assuring adequate pension benefits and containing the destructive impact of inflation. (The problems concerning pension plan coverage, adequate pension benefits and the impact of inflation on pensions were being examined largely through government sponsored research).

Mr. Hurd indicated that in furtherance of the belief that the insurance business must sponsor research to ensure that it can participate in future pension policy discussions and fend off further attacks on the private pension system, the Long-Range Task Force considered several alternatives to developing this research. Consideration was given to having the Council perform the research. This was seen as impractical given the size of the Council's staff and the time Committee members would actually have to give to provide assistance. Consideration was also given to entering into a contract with a research oriented organization, such as the Urban Institute (which already does much work under contract with Federal agencies in this area.) It was concluded that this approach would involve a heavy burden on the Council in designing research oriented to the insurance business and in assuring itself that the research would adequately reflect the detailed workings of the private pension sector.

Mr. Hurd explained that, after discussion, he and Mr. McLaughlin, Chairman of the Task Force, concluded that the best approach was to join the Employee Benefit Research Institute (EBRI), organized primarily by pension consultants. According to Mr. Hurd, this organization could serve indirectly as a voice for the pension industry, since it is involved in conducting researching the way the private sector wants to see it done, and this cooperative effort—between the insurance business, the consultants and other private sector interests—would assure more credibility for the private pension industry as a whole.

A staff memorandum was distributed to the Committee to provide more detail about the EBRI program. The salient features of the EBRI proposal, as reported in the memorandum, were that the Council would undertake a commitment of $300,000 to $400,000 per year as a contribution to EBRI. In return, the Council would nominate three persons to serve on the EBRI's Board of Trustees (presently EBRI has 13 trustees and plans to enlarge the Board to 25-30 trustees). It was pointed out that the fee and trustee membership are negotiable items. EBRI's current research plan is designed to cover about two years and would include: (1) a survey of existing literature; (2) the preparation of a research agenda based on judgement about existing gaps in knowledge on pensions and about what policy issues are apt to be critical; (3) the preparation of issue papers on retirement income programs, such as what retirement income levels should be established? What is the appropriate mix of public and private programs? and how should these programs be paid for?; (4) preparation of a series of study papers on recent status and trends in retirement income programs, including (i) coverage, participation and vesting; (ii) demographics; (iii) funding of retirement programs and the role of retirement markets and (iv) benefit levels and their adequacy; (5) the development of an integrated analysis of the impact of major policy alternatives over the long-term, including the interreaction of demographic characteristics, economic performance and capital markets and the mix of retirement income policies—this stage of the analysis will employ the dynamic micro simulation technique through contracts with the research agencies ICF and Mathematica; and (6) finally, the provision of an alternative policy forecast and an analysis of longer term policy issues, to be completed by June 1981.

It was reported that if the Council chose not to participate in EBRI, EBRI would begin to solicit insurance companies individually. EBRI is asking individual companies (insurance, banks, consulting firms and other private businesses) for $25,000 of one trustee slot.

Mr. Hurd invited comments about the EBRI proposal. In the general discussion, a number of viewpoints were expressed:

— Considerable doubt was expressed about the ability of EBRI to raise much money from direct solicitation of insurance companies.

— Some doubt was expressed about the technical competence of EBRI.

— A number of speakers expressed a preference for a research program explicitly focussed on a few specific questions that are important to life insurance companies. (In this connection, it was pointed out that the fundamental issue here—what retirement incomes will be 20-30 years in the future—makes the "specific" issues so interrelated that they have to be addressed from the standpoint of a basic model of the retirement income process).

— Several speakers emphasized the existence of a separate "Pension industry" and the desirability of participating in developing an effective voice for that industry.

— Several speakers felt that some sort of research effort was appropriate but that they had not been shown enough to make the case that this was the way to go.

— Several speakers expressed concern about the prospective "minority" status of the life insurance group in the EBRI Trustees.

Mr. Hurd suggested that the Committee had to decide (1) whether or not there should be some recommendation for Council action on establishing pension research, and (2) whether or not EBRI was the way to go. Mr. Hurd also expressed concern that if the

Committee were to select the EBRI route, would the Council fund the program if a proposal were not submitted to the Council's Board in a timely fashion. Richard Minck, Executive Vice President of the Council, responded to the latter concern. Mr. Minck pointed out that the Council has a long-standing program of sponsoring economic research, which is currently being carried on. The Board, historically, has funded very specific research projects with close supervision provided by Council committees and staff. With regard to non-specific research programs, the Board has generally taken the position that the companies, individually, may be the preferable way to fund such a program. Mr. Minck also pointed out that it is not imperative to rush a decision in order to have a project included in next year's program, since the Board has established contingency funds for unexpected expenditures and has, on special occasions, increased member company assessments to handle unexpected expenditures.

The Committee then voted on whether the Council should participate in basic pension research. The answer was unanimously yes. The Committee then voted on whether the Council should pursue at this time joining EBRI based upon the proposal presented to the Committee. The vote was no by a vote of 10 to 4.

The matter was left that the Long Range Task Force would continue discussions to develop additional research options.

Sex Discrimination

It was reported that the Council had just published a pamphlet entitled, "Private Pensions and Working Women". The pamphlet was passed out to the Committee members. The pamphlet was developed by a special Task Force headed by Dave Hurd to provide the press with an explanation of how defined contribution plans work and why lifetime monthly benefits will, and should, differ in amount for similarly situated men and women.

It was also reported that the Council has been carefully monitoring (1) EEOC's progress in developing an interpretative bulletin under the Equal Pay Act (the Council has met twice with the EEOC staff on a proposed bulletin requiring "equal benefits"; no final bulletin has been developed to date and probably will not be for a while); (2) the California Fair Employment Practice Commission's

proposed regulations on discrimination in employment (the Council filed comments and testified against an "equal benefits" requirement); and (3) recent court cases involving TIAA-CREF. Don Willard of TIAA-CREF gave a brief report on the disposition of cases TIAA-CREF is involved in.

Pension Survey Questionnaire for the President's Commission on Pension Policy

Harrison Givens asked that a Task Force be established to review a pension survey questionnaire which is being used to gather data on pension coverage for the President's Commission. He noted that the questionnaire was being used in a household survey and contained many difficult questions which it is hard to imagine people could answer. Thus, we should be prepared to rebut misleading conclusions. It was reported that Matt Greenwald, on the Council staff, was reviewing the questionnaire and had an appointment to discuss the study with Commission staff. The Chairman suggested that Harrison Givens be appointed to head such a Task Force and that other individuals who may be willing to serve on the Task Force notify Mr. Givens. The Committee unanimously approved the Chairman's suggestion.

IRS Joint and Survivor Annuity Provision Requirements—Profit-Sharing Plans

It was reported that George Powell of Prudential had informed staff that the Internal Revenue Service had indicated that it may take the position that a possibility of distribution in-kind of a life insurance contract necessitates qualified joint and survivor annuity provisions in a defined contribution plan. Under such a position, the IRS would hold that because the contracts distributed permit the participant to apply the cash value to an annuity, the plans would either have to be amended to make the joint and survivor annuity benefit the normal form of benefit or the contract would have to be amended to remove a life annuity as a settlement option. It was reported that a lawyer who was negotiating this point with the IRS had favorably resolved the issue in his case. Since there were no other expressions of concern, the Committee took no action.

Report on Council Testimony Before Various Government Commissions

Dave Hurd reported that he, along with other Council representatives, had testified before three Commissions:

(1) The National Commission on Social Security;

(2) The President's Commission on Pension Policy; and

(3) A Study Group of the President's Commission on Pension Policy.

His testimony before the three Commissions generally dealt with either the relationship between pension plans and Social Security or why the integration of pension plans with Social Security is an important component of pension planning.

Report on Effort to Move Legislation Allowing Deductions for Employee Contributions to Pension Plans

It was reported that several bills had been introduced during this session of Congress which would provide a limited exclusion from income tax for interest paid by banks and savings and loan associations. The Committee was informed that current Council policy regarding this type for legislation is not to seek to have the bills expanded to cover interest paid on life insurance accumulations, i.e., interest on proceeds left on deposit or interest on accumulated dividends. The Council's position does contemplate, however, clarifying the legislation at the Congressional staff level, so that if an individual borrows from a life insurance contract and deposits the money in a bank account to qualify for the exclusion, the deduction for the interest on the policy loan would be disallowed.

The Committee was further informed that the Council has established a special lobbying group to develop a lobbying strategy, both for the short-term and long-term, in order to create a constituency in Congress to support legislation which would allow deductible employee contributions to qualified pension plans or IRA's. It was further reported that there is probably no chance for such legislation this year, but for next year, the chances look better. In any event, such a proposal would be raised as a companion to legislation allowing tax

exemption for savings account interest—on the ground that it is also a way to create new capital formation.

The Next Pension Committee Meeting

The Committee agree that the next meeting would be held on January 22, 1980.

The meeting was adjourned at 2:40 p.m.

American Council of Life Insurance

1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4191

Stephen W. Kraus
Associate General Counsel

December 16, 1983

TO: Task Force on Fiduciary Matters

RE: Next Meeting

Your chairman has scheduled your next meeting for Thursday, January 26, 1984, in the Board Room of the Council's offices, beginning at 10:00 a.m. Since lunch will be served, please let Judy Grossman (202-862-4193) know if you will be attending.

The agenda for the meeting is as follows:

1. General Account Problem. As you are all well aware, ever since the enactment of ERISA, there has been concern regarding the treatment of general account assets and the potential application of ERISA's fiduciary responsibility provisions and prohibited transaction rules to these assets. In particular, the issue is whether general account assets are plan assets.

The Labor Department very early took a favorable position with regard to this issue in IB 75-2. Recently, however, the 7th Circuit Court of Appeals in Peoria Union Stock Yards Company Retirement Plan vs. Penn Mutual held that the assets held under a general account contract were "plan assets" and that Penn Mutual was a fiduciary with respect to these assets.

As a result of this recent activity, some companies believe that unless some action is taken quickly, either legislative or regulatory or a combination of both, the issue will be decided adversely to the industry. Most companies would consider this to be an unacceptable result.

Accordingly, you should be prepared to discuss this issue and what action the Council should take in attempting to achieve a

favorable resolution. Also, other general account issues will be discussed including the questions raised by the decision in Chicago Board Options Exchange vs. Connecticut General. I am enclosing some material prepared by Groom & Nordberg and the Aetna for your information.

2. Shared Real Estate Investments. A report will be given regarding this issue, particularly the status of the Advisory Opinion request submitted by the Metropolitan and the class exemption submitted by the Equitable. There is enclosed for your information a copy of an exemption application recently submitted by the Metropolitan dealing with this issue.

3. Guaranteed Interest Contracts Separate Accounts. As you will recall, a request was filed with the Department of Labor for an Advisory Opinion which would state the position of the Department of Labor that guaranteed interest contract separate account assets are not "plan assets". Recently, the Labor Department issued a favorable Advisory Opinion, a copy of which is enclosed for your information. A report will be given regarding the status of the class exemption that was proposed in connection with this issue and the need for finalizing the exemption in light of the favorable Advisory Opinion letter.

If there are any other issues you would like placed on the agenda please let me know as quickly as possible. Also, if any company wishes to invite their Washington Representative to the meeting to participate, particularly in the discussion concerning the general account asset question, you are certainly welcome to do so.

I wish you all a happy holiday season and a healthy and happy New Year. I look forward to seeing you all on January 26.

Sincerely,

Stephen W. Kraus

SWK/jsg
Enclosure

American Council of Life Insurance

1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4191

Stephen W. Kraus
Associate General Counsel

March 22, 1984

TO: Pension Committee
Pension Committee Task Force on Fiduciary Matters

RE: General Asset Account Proposed Legislation

Enclosed is a copy of a memorandum we just filed with the Labor Department setting forth the basis for the details of our proposal to amend ERISA in order to clarify that the fiduciary responsibility and prohibited transaction provisions do not apply to the investment or management of general account assets or to the exercise of rights accorded to life insurance companies under general account contracts issued to employee benefit plans. We are attempting to meet with Mr. Monks, the new Administrator of the Labor Department's Office of Pension and Welfare Benefit Programs, as soon as possible.

A meeting will take place on Friday, March 23, between Secretary of Labor Donovan and Mr. Schweiker, who will be accompanied by two Chief Executive Officers. The purpose of this meeting is to impress upon Secretary Donovan the importance of the general account contract issue and the need for prompt Labor Department consideration.

I appreciate the many comments received in connection with the development of the enclosed memorandum. I hope that all of the significant items have been incorporated into the memorandum.

If you have any questions or would like to further discuss this matter with me, please do not hesitate to call.

Sincerely,

Stephen W. Kraus

SWK/jsg
Enclosure

PROPOSED ERISA AMENDMENT

INSURANCE COMPANY GENERAL ACCOUNT CONTRACTS

This memorandum sets forth the basis for and the details of a proposal to amend the Employee Retirement Income Security Act of 1974 (ERISA) to clarify that the fiduciary responsibility and prohibited transaction provisions of ERISA do not apply to the investment or management of the general corporate assets of life insurance companies (the insurer's "general account") or to the exercise by life insurance companies of rights accorded to them under general account contracts issued to employee benefit plans.

I. Introduction

Insurance company contracts are one of the primary vehicles for the funding and distribution of retirement benefits to participants and beneficiaries of employee benefit plans in the United States.* As in the case of insurance policies issued to individuals and entities for other purposes, considerations paid to the insurer under most of these contracts become a part of the insurer's general corporate assets (usually referred to as the insurer's "general account").* It is out of the

* At the end of 1982, retirement plans funded with life insurance companies covered 30.5 million persons and provided retirement income to 3.1 million individuals. The pension reserves supporting these plans equalled $228.9 billion at the end of 1982, of which $174.9 billion was held in insurance company general accounts. Total insurance company general account assets exceeded $422 billion by the end of 1982. American Council of Life Insurance, Pension Facts (1983).

* Some insurance company contracts issued to pension plans provide for the allocation of contract deposits to one or more segregated asset accounts (separate accounts) and entitle the contractholder/plan to a pro rata share of the investment experience of the assets held in the separate accounts. Some insurance companies also maintain separate accounts that are utilized solely in connection with contracts providing for guarantees of principal and interest rate or for non-participating fixed annuities. Contractholders of these contracts do not share or participate in the investment experience of such separate accounts, and the Labor Department has taken the position that the assets of these separate accounts do not constitute "plan assets" for purposes of ERISA. See DOL Advisory Opinion 83-051A (September 21, 1983). The ERISA amendment proposed herein would codify the Department's position with respect to this type of separate account.

general account that an insurer pays all of its obligations to its policyholders (other than contractholders participating in its separate accounts) and its creditors, supports all of its other business activities, and, in the case of stock insurance companies, pays dividends to its shareholders. While many of these general account contracts involve participation by the contractholder/plan in the investment or mortality experience of the insurer, all of these contracts involve the assumption by the insurer of certain obligations (which vary from contract to contract) that go beyond the obligation merely to pass through to the contractholder a pro rata portion of the investment gains and losses of an identified pool of assets. Consequently, besides specifying the obligations of the insurer to the plan and its participants and beneficiaries, insurance company contracts offered to retirement plans typically will accord to the insurer various rights that it may exercise at its discretion for the protection of its own interests and those of its other policyholders in connection with the control and management of the risks which it has assumed under the contracts. Many of the rights accorded to the insurer are designed to comply with state insurance laws that require that policyholders not suffer unfair discrimination.

Since ERISA's enactment, the life insurance industry has conducted its business on the basis of a common understanding that its general account assets (as distinguished from its separate account assets) are not "plan assets" under ERISA and that, consequently, it is not subject to ERISA's fiduciary responsibility and prohibited transaction provisions in managing such assets or in exercising discretionary contractual rights accorded to it for the purpose of managing the risks which such assets must support. This understanding has been based on the legislative history of ERISA and interpretation of ERISA by the Department of Labor and the IRS. Recently, however, based largely on ambiguities in the statutory language, the Seventh Circuit Court of Appeals has rendered two decisions* which call this understanding into question and which undermine the intent of Congress to exclude insurance companies from fiduciary status

* Peoria Union Stockyards Company Retirement Plan v. The Penn Mutual Life Insurance Company, 698 F.2d 320 (7th Cir. 1983) and Chicago Board of Options Exchange v. Connecticut General Life Insurance Company, 713 F.2d 254 (7th Cir. 1983).

with respect to their general account business. While the holdings in those cases are, of course, limited to their particular facts, they create precedential authority for the broad application of ERISA's fiduciary responsibility and prohibited transaction provisions to (i) the management by an insurer of its general account assets, and (ii) the exercise by an insurer of discretionary rights accorded to it under general account contracts with employee benefit plans. Such a broad application of ERISA would materially and adversely affect the insurance industry's management and investment of billions of dollars of assets and the anticipated operation of hundreds of thousands of contracts to the detriment of the industry, its policyholders (including employee benefit plans), shareholders and third parties that look to insurance company general accounts as a source of investment funds for their businesses. Moreover, such an application of ERISA would conflict with the broader regulatory scheme imposed on an insurer's general account operations under state insurance laws.

The general account of an insurance company is not a mere commingled investment fund for employee benefit plans, but reflects all of the assets and liabilities of all the insurance and ancillary operations of an insurance company, except those assets and liabilities specifically allocated to separate accounts. Usually, the greatest number of general account contractholders of a life insurance company are owners of life insurance policies, beneficiaries of such policies and others who are not participants in employee benefit plans. Thus, the normal operations of a life insurance company require that decisions be made with respect to the management of assets and exercise of contractual rights that may affect different classes of contractholders or branches of the company's business in different ways. State insurance regulation of an insurer's operation of its general account and issuance and management of general account contracts is designed to reconcile and protect the interests of all parties having an interest in the general account.

In contrast, the application of ERISA's fiduciary responsibility provisions would require insurers to manage general account assets and exercise discretionary rights under general account contracts "solely in the interest of [employee benefit plan] participants and beneficiaries," and "for the exclusive purpose of providing benefits"

to such participants and beneficiaries. Literally applied, the application of these provisions might preclude an insurance company from utilizing its general account assets to pay benefits to non-ERISA-covered policyholders or to pay dividends to its shareholders. Or, these provisions might preclude an insurer from exercising a contractually granted discretionary right to amend a contract in the event that the risks under such contract had materially changed in such a way as to impair the insurer's ability to satisfy its obligations to its other policyholders. Insurance companies cannot be expected to disregard the interests of non-employee benefit plan policyholders or to favor the interests of plan contractholders over other classes of policyholders, or to disregard the interests of all other employee benefit plan contractholders when taking action under one contract issued to a plan. Nevertheless, such a result, which was clearly never intended by Congress, might obtain if ERISA's fiduciary responsibility provisions were broadly applied to an insurer's general account business.

Additional problems would result from the application of the prohibited transaction restrictions of ERISA to the investment of insurance company general account assets. Under the prohibited transaction restrictions, an insurer might not, without prior government approval, be able to engage in any investment transaction with any company or person that is a "party in interest" with respect to any plan that is a general account customer of the insurance company. Because the definition of "party in interest" is extremely broad, and because insurance companies may have general account contracts with thousands of employee benefit plans, these restrictions, if applied, would disrupt the vast majority of an insurer's customary investment transactions. However, as the Labor Department and the IRS have acknowledged in interpreting ERISA to exclude general account assets from treatment as plan assets, because of the size of an insurer's general asset account and the large number of general account policyholders, the risk of any one plan being able to influence the investment policy of an insurer respecting the general account is extremely slight and, therefore, the protections for plan participants and beneficiaries provided by the prohibited transaction provisions would be of no practical value in this context.

Because of the uncertainty that has been created by the recent court decisions and the widespread negative impact that these deci-

sions might have, legislation is needed as soon as possible to make clear that the fiduciary responsibility and prohibited transaction provisions of ERISA do not apply to the investment and management of insurance company general account assets or to the exercise of discretionary rights by insurance companies accorded to them under general account contracts issued to employee benefit plans. The current lack of certainty in this area stems mainly from the ambiguous language of ERISA itself. Thus, only Congress can definitively correct the problem.

The discussion below describes the background of this issue, the development of the law in this area, and the policy considerations that militate against applying ERISA's fiduciary responsibility and prohibited transaction provisions to insurance company general account operations. This discussion is followed by a proposed amendment to ERISA that would clarify the law in this area.

II. Development of General Account Contracts

At the time ERISA was enacted, by far the greatest part of the huge amount of assets held to pay retirement benefits to privately employed persons was held by banks and insurance companies, but in significantly different ways. Banks held retirement plan assets in trust, with the assets of each plan ordinarily held in a separate trust.* Employer contributions could be traced into the stocks, bonds and real estate bought for each plan. The bank trustee did not guarantee interest, investment performance or the preservation of principal. The assets of each plan could be easily identified; they were managed by the bank trustee or by another adviser retained to so; and they simply grew (or diminished if, for example, the stocks in which they were invested decreased in value) with whatever investment results were achieved.

Insurance companies provided a very different facility. Over the past 30 to 40 years, they have sold annuity contracts, primarily group

* At the end of 1973, about $126 billion were held by banks and $56 billion by insurance companies. Details taken from Pension Facts 1976 (American Council of Life Insurance). Beginning in the mid-1950's, banks began to commingle the assets of several plans in what were known as commingled pension trust. This was done to provide more efficient investment of, primarily, the assets of . . . [TEXT CUT OFF]

annuity contracts, that set forth contractual promises, commonly referred to as "guarantees," describing the rights of the contractholder (e.g., the employer or other plan sponsor) and the "benefits" to be paid to the employees covered by the plan and their beneficiaries. Except for "separate account contracts," these contracts invariably provided for a bookkeeping "account" to which would be credited the employer's contributions and interest and other amounts, such as dividends or rate credits, that to some extent were expressly guaranteed and to some extent left to the discretion of the insurer based on its investment and mortality experience.* This bookkeeping account would also be debited with amounts used for the payment of pension and with any fees or charges stated in the contracts. The contracts generally promised that the amounts accumulated in the account could be used to provide annuities at guaranteed rates for retiring employees.

Additionally, these contracts typically provided various options under which amounts could be withdrawn under the contract upon its termination or for diversion by the plan to another funding or distribution vehicle. Depending upon the circumstances of the withdrawal and the specific withdrawal option selected, amounts withdrawn might be payable at book value or might be subject to adjustment to reflect gains or losses resulting from the diversion of investment income or sale of investments by the insurer to accommodate such withdrawals. These adjustment provisions reflected the fact that insurers, in accepting and managing risks under general account

* Separate accounts were authorized un[illegible]ate insurance laws in order to allow insurers to offer products to pension p[illegible] which provided plans with the actual investment performance achieved in "their" assets and, thus, be able to compete with bank trust funds. These laws enable the insurer, through the use of a "separate account annuity contract," to segregate the assets of the individuals plan from its general account, invest them separately, and credit the plan with actual investment results. Alternatively, the insurer could hold assets in a commingled separate account, similar to a commingled trust, under which each plan participating in the separate account would be credited with its pro rata share of actual investment results. The Congress, recognizing that insurance companies had no beneficial interest in separate account assets and did not share in the investment performance of these assets, amended the Internal Revenue Code to exempt investment income and capital gains and losses arising from such accounts from the federal income tax laws applicable to insurance companies. Like a bank trustee, the insurer simply received a fee for managing the assets in the separate accounts.

contracts, contemplated a long-term relationship with the plan. Where the contractholder determined voluntarily to make withdrawals for reasons other than to pay benefits when due, fairness to the insurer and its other employee benefit plan and non-employee benefit plan general account policyholders required that adjustments be made to reflect the economic consequences of the particular contractholder's voluntary withdrawal.

Because contracts issued to pension plans commonly extend over long periods of time during which changes in environmental conditions affecting the insurer's investment or mortality experience as well as changes in the plans could materially affect the insurer's risk, the contracts also typically accorded the insurer various discretionary rights which it could exercise for its own protection and the protection of its other policyholders to avoid or ameliorate unreasonably high or unforeseen adverse financial experience or risk exposure. Such rights might include rights to prospectively modify guarantees, defer withdrawal payments or amend provisions of the contract. The existence of these rights can also be an important factor in reducing risk charges imposed under these contracts.

Premiums received under these contracts became part of the general account of the insurer and were invested to the extent not used for other corporate purposes. No contribution, or premium, could be traced into the assets in which it was invested. In the case of a large company, amounts received became an indistinguishable part of its billions of dollars of assets.

Many contracts that have been issued by insurers to retirement plans are "participating" contracts that were developed in recognition of the possibility that favorable financial experience could occur over the long periods that these contracts are normally intended to be in effect (e.g. 30 to 40 years or more). Under these contracts, the insurance company typically guarantees the principal amount (i.e., the consideration paid under the contract), any earnings that have previously been accumulated under the contract, and the continued payment at fixed levels of any annuity benefits. Favorable general account investment, mortality or expense experience beyond these guarantees is either distributed to the contractholder via dividends or

is credited to the contractholder's account, depending on the contract form.*

Thus, contracts funded through an insurer's general account were and continue to be fundamentally different from arrangements such as trusts, advisory agreements, and insurance company separate accounts to which ERISA's fiduciary provisions generally apply. Unlike such other arrangements, general account contracts have several essential characteristics which make the application of ERISA's fiduciary responsibility provisions inappropriate and impractical.

First, general account contracts involve the assumption of obligations by the insurance company that go beyond the obligation merely to pass through to the contractholder a pro rata portion of the investment gains and losses of a specified pool of assets. Such obligations vary from contract to contract, but may include guarantees of principal, minimum rates of interest to be credited to the contractholder's account, guarantees of premium rates at which annuities can be purchased, and obligations to repay specified amounts upon contract termination. Because many of these contracts provide for varying degrees of participation by the contractholder in the investment, mortality, or expense experience of the insurer, few of the contracts can factually be said to be totally "guaranteed." However, all of these contracts involve some measure of risk assumption by the insurance company that is not present in a typical trust or asset management arrangement.

Second, all of the obligations of an insurance company are secured by the assets held in the company's general account on an unsegregated basis. These obligations include not only the company's obligations to its ERISA-covered plan contractholders, but its life,

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* Participation in the investment experience of the insurer generally takes the form of an allocation of the insurer's investment income among classes of contractholder funds. This allocation may be in proportion to total funds, or may be in accordance with any investment year method. Investment year methods may be applied over the entire general account, or separately to major business segments of the general account. Such allocation methods, however, do not in any way constitute an identification of specific general account assets with specific obligations of the insurer. All assets of the general account stand behind all general account obligations.

accident and health insurance policyholders as well as its general creditors. Therefore, any actions which an insurer takes with respect to its general account assets or with respect to any particular general account contract potentially affect all of the insurer's general account policyholders, shareholders and creditors.

Third, the nature and extent of the contractual obligations and guarantees assumed by insurance companies vary widely from one type of contract to another (e.g., between disability contracts, health insurance contracts, and employee pension benefit plan contracts) as well as among contracts of the same type. Therefore, any particular action which an insurer takes in connection with its general account assets or particular contracts will not necessarily affect all parties with an interest in the general account in the same fashion.

These factors together — the assumption of risks by the insurance company, the security provided for all general account obligations by all of the assets of the insurance company's general account on an unsegregated basis, and the variety of obligations and guarantees assumed by the insurance company — require an insurance company to manage its general account on a basis that permits it to satisfy its obligations and guarantees to, and consider the welfare of, all of its contractholders (and, in the case of stock companies, its shareholders), not solely its employee benefit plan contractholders.

By contrast, the fiduciary (trustee) of a trust fund or account or the fiduciary (insurance company) of a separate account is only obligated to return the assets held in the account, plus or minus any gains or losses, and to act in a manner consistent solely with the needs of the account's beneficiaries. Also, assets of a trust or separate account must be law be segregated solely for the beneficiaries of that account, or pooled solely with assets of like accounts. For these reasons, if trust or separate account assets lose value or become entirely worthless, the fiduciary, in the absence of a breach of its fiduciary responsibilities, has no obligation to make up the loss or to pay benefits regardless of the loss, nor are other assets of the fiduciary available to make up the loss. Additionally, assets held in trust may not be used by a fiduciary to satisfy non-trust obligations that the fiduciary has assumed. Further, because the trust or separate account arrangement legally isolates the account's assets from other assets

held by the fiduciary, requiring the fiduciary to satisfy the "exclusive benefit" requirements of ERISA does not affect other parties to whom the fiduciary has obligations, nor does it require the fiduciary to conduct its independent business affairs contrary to its own interests.

These differences between the general account of an insurance company and a separate account or trust fund were recognized when the fiduciary responsibility provisions of ERISA were enacted.

III. Development of the Law

As indicated above, contracts funded through an insurer's general account have several characteristics which distinguish them from trusts, advisory agreements, and insurance company separate accounts and which make the application of ERISA's fiduciary responsibility provisions to those contracts inappropriate and impractical. Thus, Congress, in enacting ERISA, expressed a clear intent to exclude an insurer's management of its general account business from ERISA's fiduciary responsibility and prohibited transaction provisions. Such intent has been consistently supported and reinforced by the Department of Labor and IRS in agency interpretations. Unfortunately, the statutory provision designed to effectuate Congress's intent is not clearly drafted and leaves room for various interpretations, as evidenced by the Peoria and CBOE decisions.

Under ERISA, a determination of whether a person is a fiduciary with respect to a plan generally depends on whether such person has any discretionary authority, responsibility or control with respect to the management of "plan assets." ERISA section 3(21)(A). Although the term "plan assets" is not defined in ERISA, section 401(b)(2) provides an exclusion from "plan assets" treatment for insurance company assets maintained in connection with "guaranteed benefit policies." Specifically, section 401(b)(2) of ERISA provides that —

> In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of the insurer.

* * * *

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in the separate account, but excludes any other portion of a separate account..*

The language of this provision has been the source of some uncertainty regarding general account contracts because of the use of the term "guaranteed benefit policy." The insurance industry has acted with the understanding, however, that all general account contracts are "guaranteed benefit policies" because such policies involve the insurer's assumption of obligations that, unlike a trust arrangement or separate account, go beyond the obligation merely to pass through to the contractholder a pro rata portion of the investment gains and losses of a specified pool of assets. Indeed, any contrary interpretation would have rendered the "guaranteed benefit policy" language meaningless because if even one general account contract were not regarded as a "guaranteed benefit policy," all of an insurer's general account assets would, in effect, become "plan assets" as in the case of pooled investment funds such as bank collectively trusts and pooled separate accounts.

Additionally, while the statutory language clearly provides that the "guaranteed benefit policy" itself is a plan assets, it was understood that such designation was intended merely to confirm that the exercise by a plan administrator, trustee or other party of the rights accorded to the plan under the contract would be subject to ERISA's fiduciary responsibility provisions, as distinguished from the insurer's management of the assets held under the contract or its exercise of the contractual rights accorded to it for its own protection and the protection of all of its policyholders in connection with the management of such assets and the risks which they support. There was no

* Even in the absence of the section 401(b)(2) exclusion, the general account assets of an insurer should not be regarded as "plan assets," for reasons similar to those that support the conclusion that the assets of other business corporations with which a plan may contract are not plan assets. It is therefore particularly unfortunate that a statutory exclusion which should have simply made clear a particular application of a broader principle has been read by some courts as a narrow limitation.

basis to read this clarification that plan trustees hold "guaranteed benefit policies" as fiduciaries — just as they hold other non-insurance contract rights — as implying that the insurer, unlike any other party to a contract with an employee benefit plan, is a fiduciary in exercising its rights under the contract.

The conclusion that general account assets are not subject to ERISA's fiduciary responsibility provisions is amply supported by both the legislative and administrative history of ERISA. The last Senate bill preceding the enactment of ERISA provided that the fiduciary responsibility provisions would not apply to "funds of an insurance carrier unless that carrier holds funds in a separate account." See section 511 of the Senate amendment to H.R. 2. Further, in the staff summary of the Senate and House versions of ERISA that was used by the ERISA conference committee, it was stated that under the Senate amendment to H.R. 2, the fiduciary responsibility provisions would not apply to funds held by an insurance company unless they are held in separate accounts and that the policy of the House bill was the same. Summary of Differences Between the Senate Version and the House Version of H.R. 2 To Provide for Pension Reform, Part Three, Fiduciary and Enforcement, June 12, 1974, at 2 and n.3. Thus, although the language of section 401(b)(2) was somewhat ambiguous, the intent of Congress to exempt insurance companies from coverage under the fiduciary responsibility provisions of ERISA in connection with their general account contracts was clear.

This Congressional intent is further evidenced by the treatment of separate account surplus in section 401(b)(2) of ERISA. The suggestion for inclusion of a provision for the treatment of such surplus was included in the Summary of Differences used by the ERISA conferees. In brief, separate account surplus is funds transferred to a separate account from an insurance company's general account. Under section 401(b)(2), as quoted above, all assets of the separate account are treated as "plan assets" subject to the fiduciary responsibility provisions of ERISA, except "surplus in the separate account." If surplus is not "plan assets" in a separate account, it makes no sense to treat the same assets as "plan assets" when in the general account.

Shortly after ERISA's enactment, the life insurance industry requested that the Labor Department and the IRS issue interpretive rulings to resolve any ambiguity raised by section 401(b)(2). This interpretive request included descriptions of various types of contracts (e.g., deferred annuity contracts, deposit administration contracts, immediate participation guarantee contracts) under which contractholder payments are allocated to an insurer's general account and which involve elements of participation in the insurer's investment and mortality experience.

In response, and as one of their first major pronouncements under ERISA, the Labor Department and the IRS promulgated Interpretive Bulletin 75-2 (February 6, 1975) ("IB 75-2"). IB 75-2 generally provides that the investment by a plan in securities of a corporation or partnership will not, solely by reason of such investment, be considered to be an investment in the underlying assets of such corporation or partnership so as to make the assets of such entity "plan assets." In particular, IB 75-2 provides that —

> if an insurance company issues a contract or policy of insurance to a plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets.

Interpretive Bulletin 75-2 did not purport to amplify the meaning of "guaranteed benefit policy," but rather stated simply and directly that the assets maintained in connection with an insurer's general account are not plan assets. The fact that general account assets were addressed in an interpretive bulletin dealing with the assets of corporations and partnerships is important, for it reflects a recognition that the general corporate assets of a insurer, like the assets of any other business, could not be managed exclusively for the benefit of employee benefit plans which might be deemed to have an interest in such business.

Shortly after IB 75-2 was issued, Paul J. Fasser, Jr., Assistant Secretary of Labor for Labor Management Relations, explained to a Subcommittee of the House Committee on Labor and Education some of the reasons why general account assets are not treated as plan assets for purposes of the fiduciary responsibility provisions of

ERISA. His statement to the Congress is worth quoting at some length:

> Let's take a large multiemployer plan, having several thousand contributing employers, the benefits of which are wholly insured but not fully guaranteed. The insurance company invests the premiums it receives from the plan along with premiums received from other policyholders, in a wide variety of ways: corporate and government bonds, real estate mortgages, other secured loans, and some equities, to mention a few. Section 401(b) could be read to mean that the insurance company could not invest its premium receipts in bonds or equity securities issued by any of the employers contributing to the policyholder plan, it could not allow any of these employers to lease space in a building on which it held a mortgage, and it could not purchase goods, services, or facilities from any one of those employers.
>
> With the introduction of expensive recordkeeping equipment to keep track of all the contributing employers so as to avoid doing business with them, these restrictions might have been manageable if the insurance company insured the benefits of only one or a few plans, but some of the large carriers have sold policies to thousands of plans. We studied the law and the underlying rationale of the prohibited transactions provisions, we studied the legislative history, we conferred with our colleagues at the Internal Revenue Service, we applied our collective common sense, and we concluded that Congress did not intend this result. We recognized that the prohibited transactions restrictions are designed to avoid conflicts of interest situations, but we knew that where the premiums paid by a plan are placed in an insurance company's general asset account, along with the assets of many other plans, the risk of any one plan being able to influence the investment policy of the insurance company respecting the general asset account is extremely slight.
>
> So we exercised our authority to interpret the law and we published an interpretive bulletin — the Service published an identical technical information release — stating that

> the mere investment of plan assets by a plan in a corporate entity or partnership does not convert the assets of the corporation or partnership into plan assets and does not make the managers of the corporation or partnership fiduciaries to the plan. Those managers are thus not restricted from engaging in normal business transactions, including transactions with persons who happen to be parties in interest with respect to the policyholder plans.

Oversight on ERISA: Hearings on Public Law 93-406 before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess. 390-91 (1975).

The Labor Department has reiterated the interpretation set forth in IB 75-2 on a number of occasions. For example, in the preamble to its proposed "plan assets" regulation, the Department stated that IB 75-2 interpreted ERISA section 401(b)(2) "to mean generally that assets held in an insurer's general account to support benefits under a contract purchased by a plan are not plan assets. . . ." 44 Fed. Reg. 50363, 50364 n.4 (Aug. 28, 1979). See also Prohibited Transaction Exemption 79-41, 44 Fed. Reg. 46365, 46368 (Aug. 7, 1979); 46 Fed. Reg. 46443, 46444 (Sept. 18, 1981). Further, in the proposed "plan assets" regulation, the Department adopted essentially the same exception from plan assets treatment for general account assets as that in IB 75-2. Prop. DOL Reg. § 3550.401b-1(d), supra, at 50363.

In the 10 years since ERISA's enactment, neither the Department nor the IRS has taken any enforcement or other action inconsistent with their above-cited pronouncements.

IV. The Peoria and CBOE Cases

In 1983 the United State Court of Appeals for the Seventh Circuit rendered two decisions, the Peoria and CBOE decisions, which undermine the intent of Congress in enacting section 401(b)(2) of ERISA and the interpretations of ERISA that have been issued by the Labor Department and the IRS. It is important to note that neither the Labor Department nor the IRS was a party to, or made an appearance in, either of these cases.

A. Peoria Case

In Peoria Union Stockyards Company Retirement Plan v. The Penn Mutual Life Insurance Company, 698 F.2d 320 (7th Cir. 1983), the Court held that a deposit administration contract was not a "guaranteed benefit policy" for purposes of section 401(b)(2) because the plan contractholder participated in the investment performance of the general account during the accumulation phase of the contract (i.e., prior to the allocation of funds to provide fixed annuities for retirees). The Court suggested that the determination of whether a general account contract is a "guaranteed benefit policy", and, therefore, whether amounts allocated to the company's general account under the contract are "plan assets" subject to ERISA, may turn on whether the rate of return under the contract is fully guaranteed by the insurance company. The Court was of the view that the insurer, during the accumulation phase of the contract, served merely as an investment advisor and that the contract was not a "guaranteed benefit policy," but was more analogous to a trust arrangement.

This analogy was inappropriate. During the accumulation phase of a contract, the insurer typically bears risks that are not a part of trust or investment advisory arrangements, such as guarantees of principal and interest previously accumulated, minimum interest guarantees, and the right of contractholders to effect annuities at any time under a guaranteed price structure. See S. Huebner and K. Black, Life Insurance, at 605 (8th ed. 1972). In addition, the Court's bifurcated approach (i.e., the accumulation phase or active life fund and the liquidation phase or retired life reserve fund) to interpreting the contract is inconsistent with the fact that all of the assets of the general account are required by applicable state insurance laws to stand behind each phase of a contract. Thus, the same assets support both the active life fund and annuities for retired lives. This is not analogous to a trust arrangement where the trustee is only responsible for a segregated pool of assets.

Under the Court's holding, it would appear that any participation by a plan contractholder in the investment experience of the general account might be interpreted to preclude the applicability of the exception under section 401(b)(2). This obviously could not have been the result intended by Congress since most general account

contracts commonly offered to pension plans by insurers at the time ERISA was enacted provided for some degree of participation. The Court's interpretation would, therefore, render both section 401(b)(2) and its underlying legislative rationale virtually meaningless. Moreover, as indicated earlier, if only one general account contract is deemed not be a "guaranteed benefit policy" under the Court's test, all of the assets of the general account could be regarded as "plan assets" subject to the fiduciary responsibility provisions of ERISA.

B. CBOE Case

Shortly after the Peoria decision was issued, the Seventh Circuit again held that an insurer was a fiduciary with respect to a general account contract, but based its decision on a different rationale. In Chicago Board of Options Exchange v. Connecticut General Life Insurance Company, 713 F.2d 254 (7th Cir. 1983), the insurer exercised the contractual right expressly accorded to it to unilaterally amend a group annuity contract which was held by the Chicago Board of Options Exchange on behalf of its defined contribution money purchase thrift plan. The amendment had the effect of allowing the insurer to invoke its right to defer contractholder withdrawals under the contract where the withdrawals were for purposes other than the payment of benefits under the plan. The contractholder filed suit alleging, among other things, that the insurer, in so amending the contract, breached its duties as a fiduciary under ERISA with respect to the plan.

In reviewing the allegation of breach of fiduciary duty, the Seventh Circuit first concluded that Connecticut General was not a fiduciary by virtue of accepting deposits from CBOE and investing such deposits in its general account inasmuch as the contract appeared to be a "guaranteed benefit policy," and, therefore, deposits to the general account were not plan assets. However, the Court then noted that the group annuity contract itself was a plan asset, and concluded that Connecticut General was a fiduciary by virtue of its right to unilaterally amend the contract.

The reasoning of the Court in this case, however, overlooks the nature of the contractual arrangement and could lead to results that were certainly never intended by Congress. Like any contractual

arrangement entered into between two parties, when an employee benefit plan enters into a general account contract with an insurer, both the plan and the insurer grant to each other certain rights and agree to certain obligations. While it is clear that such a contract is a "plan asset" and that the exercise by a plan administrator or trustee of the rights accorded to the plan under the contract are subject to ERISA's fiduciary responsibility provisions, it does not logically follow that an insurer should be subject to the same fiduciary provisions when exercising the rights accorded to it for its own protection under the contract. Such reasoning would suggest that no issuer of a financial instrument to an employee benefit plan could ever retain discretionary rights which it could exercise for its own self-interest. For example, a corporation that has issued stock acquired by an employee benefit plan could, under such reasoning, be subject to ERISA's fiduciary responsibility provisions in exercising its discretion regarding whether to declare dividends; or a corporation that has issued a bond acquired by an employee benefit plan could be regarded as a fiduciary in determining whether or not to exercise a discretionary right to prepay its obligations under the bond. Thus, where any of these contractual arrangements are established, it must be recognized that both the plan and the other party agree to assume certain obligations and grant to each other certain rights which it is understood each party will be free to exercise under the terms of the contract, in its own self-interest. This fundamental principle is at the very heart of all contractual arrangements, including insurance company general account contracts typically issued to employee benefit plans.

Because of the nature of its business, the insurance industry would be particularly adversely affected by any interpretation of ERISA which precluded a company that had entered into a contract with an employee benefit plan from maintaining and exercising discretionary contractual rights for its own protection and the protection of its other policyholders. The primary business of an insurer is the assumption, pooling and management of risks. In order to prudently manage such risks, many of which may extend over very long or indefinite durations, an insurer in many instances must retain the flexibility and discretion under a contract to modify its terms or take such other discretionary action as is necessary to protect its

interests and the interests of its other policyholders when the risks which it originally assumed under the contract change materially in either their nature or magnitude because of changing or unforeseen circumstances.* It would be impossible for an insurer to manage the risks which it assumes under any general account contract without considering its obligations to its other policyholders inasmuch as the same assets must under state insurance law support and are exposed to all such risks. Such a result was never intended by Congress, as is evidenced by the provision to exempt "guaranteed benefit policies" from the fiduciary responsibility provisions of ERISA. It is, moreover, anomalous to conclude, as the Seventh Circuit has done in the CBOE case, that while an insurer by virtue of that exemption is not acting in a fiduciary capacity and may take into account the interests of its non-ERISA policyholders and shareholders in managing its general account assets, the same insurer is acting in a fiduciary capacity and cannot take into account such interests when it exercises discretionary rights accorded to its under a contract for the purposes of managing the liabilities which must be paid from the assets in its general account.

The following examples are illustrative of situations where an insurer may retain contractual discretion to manage its risks, where it is necessary for the insurer to represent its own interests and the interests of other policyholders in exercising such discretion and where the application of ERISA's fiduciary responsibility provisions would produce unreasonable and unintended results:

1. General account contracts issued in connection with retirement plans frequently are for long terms, or may have no definite maturity date and may, therefore, extend for an indefinite duration. However, such contracts typically accord to both the plan and the insurer the right to terminate the contract unilaterally under certain

* Any particular contract will set forth the specific discretionary rights which are accorded to the insurer and the conditions under which they may be exercised, and it is generally understood by the parties representing the plan in connection with the contract that such rights are intended to be exercised by the insurer on its behalf. The plan administrator or trustee representing the plan has a fiduciary obligation not to enter into such a contract unless it has determined that the discretion afforded the insurance company is reasonable in the context of the contractual obligation. . . . **[TEXT CUT OFF]**

circumstances. For example, an insurer may be accorded the right at its discretion to terminate a contract funding a defined contribution plan in the event that the plan is modified to expand the circumstances under which participants may withdraw amounts from the plan at book value. If the insurer were a fiduciary and it were required to act solely for the benefit of the participants of that plan, it might be foreclosed from exercising its right to discontinue the contract regardless of its increased exposure to losses by virtue of the plan modification and the effect of such exposure on its other policyholders, including employee benefit plan contractholders.

2. General account contracts often provide that an insurer may from time to time modify (i) guarantees as to the interest rate which will be credited to amounts deposited under the contract, (ii) guarantees as to the premium rates at which annuities can be purchased for plan participants, or (iii) formulas for determining the amounts payable to the contractholder under certain contract discontinuance options. Such discretion is necessary to protect the insurer from undue increases in its risk exposure resulting from environmental changes affecting its investment or mortality experience. From a policyholder's point of view, the retention by the insurer of such discretion generally permits the insurer to offer the policyholder more favorable contract terms than would be possible without such discretion.* Such arrangements, however, would not be possible if the insurer were precluded from maintaining and exercising such discretion in its own interests.

3. Many general account contracts issued to retirement plans allows the plan to request withdrawals for reasons other than to make benefit payments (e.g., to make other investments), but also permit the insurer, at its discretion, to defer the payment of requested withdrawals under the contract (other than regular benefit payments) during periods of extraordinary negative cash flow in the general account. Such provisions are intended to protect the insurer and its policyholders in the aggregate from the losses and impairment of the insurer's long-term financial condition which might result from a massive liquidation of investments to satisfy withdrawal requests. If,

* To the extent that insurers cannot retain discretion to deal with these risks, they must either offer products . . . **[TEXT CUT OFF ON COPY]**

however, an insurer were a fiduciary, it could be prohibited from invoking such provisions with respect to an employee benefit plan regardless of the interests of its other policyholders.

The retention of contractual discretion by an insurer may carry with it some potential for abuse. However, ERISA's fiduciary responsibility provisions are not the only means, or even the most appropriate means, of protecting employee benefit plans from such abuse Insurance regulation under state law is specifically designed to regulate an insurer's solvency and its conduct so that the interests of all of the insurer's policyholders will be protected and reconciled with each other. Indeed, contracts and policies issued by insurers are filed with and subject to review by state insurance departments before they can be offered to potential policyholders. ERISA, on the other hand, is an inappropriate regulatory scheme with respect to general account operations because it would test the insurer's exercise of its discretion solely with reference to the interests of one group of policyholders, employee benefit plans, to the total disregard of all others, and in some instances one employee benefit plan to the exclusion of all others plans and policyholders.

While the specific state insurance regulations governing insurers vary from jurisdiction to jurisdiction, such regulations generally include the following types of provisions which provide significant protections to employee benefit plan contractholders without ignoring or interfering with the insurer's obligations to its other policyholders:

1. Restrictions and requirements with respect to the investment of general account assets which are intended to assure that the insurer can satisfy all of its obligations. Such restrictions and requirements typically include limitations on the types of investments which can be made with general account assets, requirements with respect to the diversification of investments, and requirements for the maintenance of reserves.

2. Prohibitions against "unfair trade practices" which are generally broadly defined to include misrepresentations concerning the terms of a contract (including misrepresentations concerning the level of dividends or share of surplus to be credited to the contractholder)

and other false or misleading sales practices, the exercise of coercion (for example, by making the purchase of an insurance contract a condition for the insurer's extension of credit) or the granting of special favors or inducements in connection with the sales of contracts, or unreasonable or inequitable practices in connection with the administration of contracts.

3. Prohibitions against discriminatory practices, including discrimination in connection with the administration of contracts, the allocation of investment income or dividends among different categories of contractholders or the determination of premiums or other charges.

4. Restrictions on the payment of dividends to shareholders and on transactions by a life insurance company with affiliates.

5. Provisions for the review and approval by insurance departments of contracts and contract amendments.

In addition to the protections afforded by state regulation, general state contract law principles serve to significantly limit any potential for abuse in an insurer's exercise of contractual discretion. In circumstances where an insurer engages in practices that could be viewed as over-reaching or attempts to rely on ambiguous contractual provision, the courts have little difficulty in holding in favor of the contractholder. Where, on the other hand, the provisions of the contract are reasonable and clear, there is no warrant for applying ERISA to transform what should be a state contract law dispute into a federal case.

Given these protections, few, if any, potentially abusive practices by insurers in connection with the management of general account assets or the exercise of discretion under general account contracts which would violate ERISA policy would not be subject to correction or rectification. On the other hand, the substitution of ERISA's fiduciary responsibility provisions for this scheme of state insurance regulation would result in the imposition of a standard of conduct which basically ignores and is in conflict with the best interests of the insurer's constituents who are not employee benefit plans.

In enacting ERISA, Congress did not intend to have ERISA supercede the regulation of insurance companies by the states. Section 514(b)(2)(A) provides that, notwithstanding the general preemption rules of section 514(a), ERISA does not exempt any person from any law that regulates insurance. Moreover, the existence of the states' regulation of insurance companies was an important factor in the Labor Department's determination to create an exception from plan assets treatment for general account assets in its proposed "plan assets" regulation. In the preamble to the regulation, the Department stated:

> The exemption for contracts or policies issued by insurers and funded by insurers' general accounts also appears to be based upon the fact that the plan benefits provided under such contracts or policies are insured by an entity which is subject to state regulation designed to assure the entity's ability to pay benefits specified in the policy when due.

V. Need for Legislation

Because of the uncertainty that has been created by the recent court decisions and the widespread negative impact that these decisions might have, it is essential that the general account contract issue be resolved definitively and, therefore, that it be resolved through legislative action. Sound and clear rules regarding the inapplicability of ERISA's fiduciary responsibility and prohibited transaction provisions to the general account operations of insurance companies are crucial to the entire industry. If applied to general account operations, these provisions would have a materially adverse effect both on the day-to-day management of billions of dollars of obligations under contracts issued to ERISA and non-ERISA contractholders and on the daily investment of hundreds of millions of dollars. The lack of clear rules in this area stems mainly from the ambiguous language of ERISA itself — that is, the ill-defined concept of a "guaranteed benefit policy" in ERISA section 401(b)(2). Thus, only Congress can definitively correct the problem by clarifying the statutory language of ERISA.

Additionally, as experience under ERISA has shown, some courts may be unaware of, or unpersuaded by, agency interpretations

of ERISA, no matter what position the agency takes. Consequently, we believe that any administrative solution would necessarily prove to be inadequate, and that only a legislative solution will fully resolve this issue.

VI. Description of Proposed Legislation

Set forth below is a proposed amendment to ERISA that would clarify that the fiduciary responsibility provisions of ERISA do not apply to the management of general account assets or to the exercise of discretionary rights accorded to insurers under general account contracts. (Parallel changes would, of course, be made to Internal Revenue Code section 4975.)

1. Amend section 3(21) of ERISA by adding a new subparagraph 3(21)(C) at the end thereof, as follows:

> (C) If any money or other property of an employee benefit plan is paid as consideration under a contract issued by an insurer, neither the exercise by the insurer of any of the rights granted to it under such contract, nor the exercise by the insurer of any authority or control respecting the management or disposition of such consideration or any assets acquired by the insurer therewith, shall cause the insurer to be deemed to be a fiduciary under this title. This subparagraph shall not, however, preclude an insurer from being deemed to be a fiduciary to the extent that —
>
> (i) the insurer is acting as the appropriate named fiduciary of such plan pursuant to section 503 of this title,
> (ii) the insurer is exercising authority or control with respect to functions for which it has acknowledged in writing that it is a fiduciary with respect to such plan or the "administrator" of such plan (within the meaning of paragraph (16) of this section), or
> (iii) the insurer is exercising authority or control respecting the management of disposition of consideration paid by such plan or any assets acquired by the insurer therewith which has been placed in a separate account of the insurer and which remains an asset of the plan pursuant to section 401(b)(2)(B) of this title."

2. Amend section 3(21)(A) to strike the phrase "subparagraph (B)" and insert in lieu thereof "subparagraphs (B) and (C)".

3. Amend section 401(b) of ERISA by amending section 401(b)(2) to read as follow:

"(2)(A) If an insurer issues a contract to a plan and the consideration for such contract is placed in its general account, the assets of such plan shall be deemed to include such contract, but shall not be deemed to include the consideration placed in the general account or any assets acquired by the insurer therewith.

(B) If an insurer issues a contract to a plan and the consideration for such contract is placed in a separate account, the assets of such plan shall be deemed to include such contract, but shall not be deemed to include —

(i) any surplus in such separate account, or
(ii) any consideration placed in such separate account or any assets acquired by the insurer therewith if the separate account is maintained by the insurer solely in connection with fixed contractual obligations and if neither the amount payable or credited to the plan nor to any participant or beneficiary in the plan is affected in any way by the investment performance of the separate account.

(C) For purposes of this paragraph;

(i) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a state.
(ii) The term "general account" means those assets owned by an insurer which are not held in a separate account, and which, in the event of the insolvency of the insurer, will not be segregated for the benefit of particular policyholders of the insurer.".

American Council of Life Insurance

1850 K Street, N.W.
Washington, D.C. 20006
(202) 862-4191

Stephen W. Kraus
Associate General Counsel

May 18, 1984

TO: Pension Committee

Enclosed, as approved by your Chairman, is a copy of the minutes of the April 19, 1984, meeting of the Pension Committee.

Sincerely,

Stephen W. Kraus

SWK/jsg
Enclosure

The meeting convened at 10:00 a.m.

The following members were present:

Donald H. Pond, Jr., Chairman	E. Thomas Hughes
Herbert J. Boothroyd	Elliot Kassenoff
Yuan Chang	David J. McDonald
Gilbert F. Cronin	John M. Naughton
Peter Cross	Russell H. Smith, Jr.
William Cunningham	Henry N. Winslow
William F. Gould	

The following members were unable to attend:

Theodossios Athanassiades	Robert M. McDonough
William L. Cassidy	Kenneth R. O'Brien
Richard C. Higgins	William C. Prouty

Others present during all or part of the meeting were:

Melvin B. Altman, Equitable
Bethany Alvord, Massachusetts Mutual
John Booth, ACLI
Douglas Clark, Connecticut Mutual
Regina Fink, Lincoln National
Stephen H. Goldberg, Aetna Life & Casualty
Marcia Henderson, New England Life
P. Scott Hutton , ACLI
David Kalib, Berkshire Life
Richard Kaplan, Phoenix Mutual
Stephen W. Kraus, ACLI
James McQueston, National Life of Vermont
Sara Moonin, New England Life
Maureen Mullen, CIGNA
Roger Napoleon, New York Life
Saul Pearlman, Acacia Mutual
Robert Prensner, New England Life
Ronald Powell, IDS Life
Barrett N. Sidel, CIGNA
John Schmidt, Connecticut Mutual

Gerard Talbot, Metropolitan
Andrew Watson, MONY
Edward Zimmerman, ACLI

Report of the Fiduciary Matters Task Force

General Account Problems. The Committee was reminded that ever since the enactment of ERISA, there has been concern within the business regarding the treatment of an insurance company's general account contracts and assets and the potential application of ERISA's fiduciary responsibility provisions and prohibited transactions rules to such contracts and assets.

The Committee was further reminded that initially, the issue focused on whether general account assets were "plan assets". The Department of Labor and IRS very early took a favorable position with regard to this issue in IB 75-2 stating that if an insurance company issues a contract or policy of insurance to a pension plan and places the consideration for such contract or policy in its general asset account, the assets in such account shall not be considered to be plan assets. It was reported that the Council legislative position had been to seek codification of this rule.

Recently, however, the 7th Circuit Court of Appeals held in two cases that insurance companies that issue contracts to employee pension benefit plans may be fiduciaries when they exercise certain rights under those contracts (Chicago Board Options Exchange v. Connecticut General Life Insurance Co.), or in the management of amounts deposited in the general account of the insurer under the contracts (Peoria Union Stock Yards Company Retirement Plan v. Penn Mutual Life Insurance Co.), or both.

As a result of these cases, the Task Force recommended, and the Committee, as a result of a telephone poll, agreed, that a legislative change to ERISA would be the most appropriate course to follow. The Committee further agreed that such legislative change should be much broader than the current Council position and should seek the following:

1. An amendment to ERISA to clarify that an employee benefit plan's investment in a contract issued by an insurer does not cause such insurer to be deemed to be a fiduciary, except insofar as the deposits under such contract are "plan assets"; and

2. An amendment to ERISA to clarify that amounts deposited under a contract issued by an insurer in the insurer's general asset account shall not be considered to be "plan assets."

The Committee was advised that the President of the Council and two Chief Executive Officers from member companies had met with Secretary of Labor Raymond Donovan to stress the importance of the issue to the life insurance business and to urge prompt and serious consideration of our legislative approach by the Labor Department. The Committee was informed that it had been determined that before any legislative effort with the Congress would be undertaken, the Council should make a serious and concerted effort to obtain Labor Department approval, or at least non-opposition, to the Council's legislative approach.

It was reported that Secretary Donovan had stated that he wants to avoid ERISA legislation because of his concern that once an ERISA bill is introduced, attempts would be made to expand the bill by others who believe they have ERISA problems. It was further reported that Secretary Donovan had indicated that he would prefer to solve our problem administratively, if at all possible. The Committee was advised that the industry representatives told Secretary Donovan that in our view the problem did not lend itself to an administrative solution and that legislation was necessary.

The Committee was further informed that after the meeting with Secretary Donovan, another meeting was held between Department of Labor staff, including the Administrator of the Department's Pension Program, Robert Monks, and the Solicitor of Labor, Frank Lilly, and Council staff and industry representatives. At this meeting, the Council's proposal was discussed in greater detail. The Labor Department representatives took our proposal under advisement and indicated that they would get back to us quickly with a response. The Committee was advised that once agreement is reached with the Labor Department, the proposal would be referred to the Cabinet

Council of Economic Advisors that deals with Pension Policy for final approval.

<u>New York State Insurance Department Letters on Group Annuity Contracts</u>. It was reported that the New York Insurance Department had issued, and is continuing to issue, letters to member companies relating to group annuity contracts. It was further reported that the New York Department has adopted two rules. The first provides that for contracts funding defined contribution plans, withdrawals from such contracts' guaranteed account for the purpose of providing plan benefits relating to death, disability, retirement or termination of employment must be made at book value. The second rule provides that a guaranteed benefit contract must provide a guarantee of principal, interest and repayment, i.e., no market value adjustment.

The Committee was informed that serious concern was expressed about these letters, particularly the views of the New York Department relating to the nature of group annuity contracts and the appropriateness of their use in the qualified plan market. The Committee was further informed that the Chairman of the Life Insurance Council of New York (LICONY) had appointed a special committee to deal with this issue.

It was reported that the Task Force decided that the issue is significant enough to warrant Council participation. As a result, a meeting is being planned between the Deputy Insurance Superintendent of New York and his staff and representatives from LICONY, the Council and the industry. At this meeting, the industry will protest the procedures used by the New York Department in issuing these letters and will try to get the Department to pull back their letters. The Committee unanimously approved the course of action outlined by the Task Force.

<u>Final "Qualified Professional Asset Managers" Class Exemption</u>. Finally, it was reported that the Labor Department had recently issued Prohibited Transaction Exemption 84-14 for plan asset transactions determined by independent Qualified Professional Asset Managers (QPAM). QPAM permits various parties who are related to employee benefit plans to engage in transactions involving plan

assets, if among other conditions, the assets are managed by "Qualified Professional Asset Managers" which are independent or such parties-in-interest and which meet specified financial standards. The exemption is retroactive to December 21, 1982.

The Committee was informed that the final exemption contains many of the changes advocated by the Council and others when the exemption was first published and at the public hearing to discuss the proposal.

Report of the Task Forces on Small Cases and Plan Design

Use of Universal Life in Qualified Pension Plans. The Committee was reminded that at its last meeting it had approved a recommendation of the Small Case Task Force regarding the use of universal life and other "non-traditional" insurance contracts in qualified defined contribution pension plans. The Committee was further reminded that the Council is proposing a two-part test to the Internal Revenue Service.

The basic test will allow a company to use its net term charge determined within the universal life, or other non-traditional, contract to test for "incidentalness". In addition, a safe harbor is being recommended. The safe harbor consists of Non-Smoker, Smoker and Combination Tables by age at entry showing per $1,000 of annual plan contribution (1) the maximum level amount at risk; (2) the maximum level death benefit and (3) the required age 65 cash value.

The Committee was informed that Council staff, together with industry representatives, had met with representatives of the Internal Revenue Service to discuss our proposals and had filed a memorandum with the Service setting forth our approach and the rationale behind it. The Committee was further informed that the IRS representatives did not appear to be too receptive to the Council's 25 percent rule, the principal problem being its susceptibility to manipulation. The IRS representatives did indicate some interest, however, in the safe harbor table.

It was reported that while the Service had not formally responded to the Council's submission, it had dealt with this issue in

connection with the recently issued Revenue Procedure (Rev. Proc. 84-23) on master and prototype plans. As part of its List of Required Modifications (LRM), the Service had set forth its view as to how universal life could be used in a qualified defined contribution plan.

The Committee was informed that the Task Forces, at their meeting yesterday, concluded that the Council should file a strong letter of protest with the IRS. The Task Forces believe that rule making through a procedural mechanism such as a List of Required Modifications is highly inappropriate, particularly when an industry proposal dealing with the issue is pending before the Service. In addition, if a rule different from that set forth in the LRM is adopted, a correcting amendment will be necessary very soon after master and prototype sponsors have undertaken the burden of restating their plans in accordance with Rev. Proc. 84-23. The Committee agreed with the recommendation of the Task Forces.

TEFRA Amendments—Procedures for Master and Prototype Plans. It was reported that the Task Forces also reviewed Revenue Procedure 84-23 which sets forth the TEFRA amendment procedures that will be applied to sponsors of master and prototype plans and to their adopting employers. The revenue procedure reflects many of the suggestions offered by the Council when staff discussed the TEFRA transition problem with the Service last year. The Committee was informed, however, that the Task Forces were very concerned about the inability of employers who wish to adopt master or prototype plans after the effective date of the procedure to utilize the special reliance procedure set forth therein. Moreover, the ability of previously adopting employers to rely on the reliance procedure was not clear to the Task Forces. As a result, the Task Forces concluded that the Council should file a letter with the Internal Revenue Service requesting clarification and expansion of the scope of the special reliance procedure. The Task Forces also determined that the Council should urge the Service to expend the revenue procedure to allow more employers who adopt a standardized form plan, as defined in the revenue procedure, to utilize the simplified approval process set forth therein. The Committee approved the Task Forces' recommendations.

ERISA Advisory Council

The Committee was informed that the Council had testified before the Department of Labor's ERISA Advisory Council on Employee Welfare and Pension Benefit Plans. The Committee was further informed that the Council's testimony dealt with the impact of ERISA and related legislation on pension and other employee benefit plans. In particular, the testimony stressed our concern with the escalating costs of plan administration as a result of new legislation and regulation and the problems the life insurance business has had, and continues to have, with the fiduciary responsibility and prohibited transaction provision of ERISA. Finally, our testimony indicated that we must develop a national policy on private pensions and that we cannot continue to have major legislation affecting pensions enacted on an ad hoc, revenue driven, basis almost every year.

Pending Litigation

Tax Reform Legislation—Proposed Pension Changes. It was reported that the Deficit Reduction Act of 1984, which was recently passed by the Senate, contains numerous pension provisions, many of which are modifications of the TEFRA top-heavy rules. In particular, the pension provisions include a repeal of the super top-heavy rules enacted by TEFRA and an additional two-year cost-of-living freeze on the dollar limits under section 415 of the Internal Revenue Code. (The cost-of-living freeze is also in the Tax Reform Act of 1984 which has been passed by the House.) The Act would also provide a special 1.4 rule under section 415 for companies with plans that are neither top-heavy nor integrated with Social Security and would add a 25% deduction limitation for employers that maintain both a money purchase pension plan a defined pension plan. (This limitation currently applies only to employers that maintain both a defined benefit and a defined contribution plan.) Finally, the Act would limit deductions to 100% of the current compensation of covered plan participants.

The Committee was informed that a coalition has been formed to develop a compromise, revenue neutral, proposal regarding the provisions mentioned above. Under the compromise, the following

changes would be made in the pension provisions of the Deficit Reduction Act:

(1) In lieu of eliminating the super top-heavy rules, the super top-heavy definition would be modified to limit super top-heavy plans to plans in which 98% or more of the benefits are for key employees;

(2) The 25% deduction limit would be eliminated;

(3) The two-year freeze on the cost-of-living increases in section 415 would be eliminated;

(5) The existing 10 years of service requirement in section 415(b)(5) (i.e., 10 years of service is required in order to be entitled to the full benefits under section 415) would be modified to also require 5 years of plan participation in order to qualify for the full dollar limitations under section 415.

The Committee discussed the proposed changes in the Senate bill and the possible compromise. The Committee agreed that enactment of the additional two-year cost-of-living freeze on the section 415 limits and the addition of the 25% deduction limitation for employers maintaining more than one pension plan would have a serious adverse impact, particularly in the small plan area. The Committee unanimously agreed that the Council should add its name to the list of organizations endorsing the compromise and should engage in low key lobbying efforts in an attempt to get the compromise adopted during the conference on the tax bills.

Pension Equity Legislation. It was reported that the House Ways and Means Committee had recently passed its version of a pension equity bill. The Ways and Means bill makes several modifications to the version of the legislation that was approved unanimously by the House Education and Labor Committee last November. In addition, the legislation is somewhat different from the pension equity legislation approved by the Senate last year.

Staff reported on some of the principal differences and similarities in the two House bills. The bills, as approved by both House

panels, would lower the minimum age for plan participation from 25 to 21. However, the Ways and Means version would not provide the optional "lookback" rule for defined benefit plans that was approved by the Labor Committee. The "lookback" rule would allow defined benefit plans to continue to use age 25 as the participation age only if, when the employee reaches age 25, he or she is credited with service from age 21 on for benefit accrual purposes.

The Committee was informed that provisions approved by the Ways and Means Committee dealing with the minimum vesting age, breaks in service, and maternity/paternity leave were the same as those approved by the Education and Labor panel.

The Ways and Means bill would provide for a separate pre-retirement survivor annuity for cases involving death of a participant prior to attainment of normal retirement age under the plan. Pre-retirement survivor coverage would become automatic when a participant has any vested accrued benefits under the plan. As approved by the Labor Committee, the bill would require pre-retirement survivor coverage only when a participant reaches the earliest retirement age under the plan and is 120 months from normal retirement age, or has 10 years of service. Under both bills, spousal consent would be required before a participant could decline a joint and survivor annuity.

The Committee was informed that pension equity legislation would be enacted during this session of Congress.

Risk Classification Legislation. Staff reported that on March 28, the House Committee on Energy and Commerce agreed to ACLI and industry supported amendments offered by Representatives Dowdy (D-MS)/ Lent (R-NY) and Representative Tauzin (D-LA) to H.R. 100, the "Nondiscrimination in Insurance Act".

It was further reported that the Tauzin amendment carves out individual lines of insurance from the bill and creates a Commission "for the purpose of studying what Federal legislation might be appropriate in order to regulate insurance not part of an employee benefit plan." The Dowdy/Lent amendment exempts all existing insurance contracts and clears up a number of other problems in the

original draft of H.R. 100. These provisions were adopted in place of an amendment proposed by Representative Florio (D-NJ) which would have exempted existing individual life insurance policies and to a lesser extent existing individual annuity contracts. However, the proposed Florio amendment would not have addressed many of the other problems raised by the original draft of H.R. 100. H.R. 100 as amended was then agreed to by voice vote and ordered reported from the Energy and Commerce Committee.

The Senate counterpart (S. 372) had been held in committee awaiting a report from the General Accounting Office. The report was issued on April 6, 1984. While the report does not fully support either the industry or the proponents, it does raise crucial issues, such as potential unfunded liabilities, the exclusion of existing individual contracts, and the need for an extended effective date.

The Committee was informed that given the short amount of time remaining in this session of the Congress and these developments, further action in either house appears unlikely this year.

Staff also reported on the extensive activity on the state level. Bills requiring "unisex" insurance were defeated in California, Maryland, Missouri, New Mexico, Oklahoma, Vermont, Washington, and West Virginia. Bills are currently pending in the District of Columbia, Massachusetts, Michigan and New Jersey. A hearing has been scheduled in Michigan on May 16, 1984, and a mark-up session has been set for May 2, 1984, in Massachusetts. The industry is mounting an effort to repeal or modify the Montana law which is to be effective October 1, 1985.

Reversion of Assets

The Committee was informed that much consideration has been given recently to the reversion of assets to pension plan sponsors in over-funded defined benefit pension plans. At present, such assets can be recovered by the sponsoring employer only upon plan termination. Consequently, a number of plan terminations have occurred where the apparent principal motivation was the recovery of excess assets.

It was reported that Congress has focused its attention on this issue, and several possible solutions are being discussed. One solution would prohibit the recovery of excess assets upon plan termination. A second would limit the definition of what is a plan termination. In addition, consideration is being given to trying to set a moratorium on the termination of pension plans involving reversions of excess assets to employers.

The Committee engaged in considerable discussion regarding this issue. One member expressed the view that permitting sponsoring employers to recover excess assets could result in a serious asset drain on life insurance companies since there would be considerable pressure to have book value cash-outs. In addition, this member felt that such a policy would accelerate an already undesirable trend away from defined benefit plans to defined contribution plans which would not be in the best interests of plan participants. Finally, this member thought that if we supported legislation prohibiting the reversion of plan assets to sponsoring employers, we would improve our public image with Congress and those groups representing plan participants. Those expressing a contrary view argued that the establishment of a pension plan is purely voluntary on an employer's part. Similarly, an employer is generally free to terminate his plan and should be entitled to any surplus after the participants' accrued benefits have been fully vested and annuitized. Such a rule would benefit not only employers and plan participants, but our members as well since it would result in more annuities being purchased.

The Committee was informed that the Administration's position on this issue is that reversions should be permitted if annuities are purchased for vested participants. However, the Administration recognizes that there are problems with certain current administrative procedures involving (1) cash-outs, (2) when a defined benefit plan is terminated and a new defined benefit plan is established and (3) spinoffs, i.e., when an employer separates his plan into two plans and terminates one of those plans.

The Committee agreed to establish a working group to examine the issue and develop a council position.

Open Questions on Employee Benefits After 1984 Legislation

The Committee was informed that employee pension and welfare benefits are coming increasingly under legislative attack. The Committee was further informed that despite the several provisions in the pending tax legislation dealing with employee pension and welfare benefits, many questions remain unresolved. Congress continues to focus its attention on the increasing amount of an employee's salary that is being used to purchase tax-favored benefits. One of the principal Congressional concerns is the annual cost to the Federal government. In addition, there is concern about whether a broad enough cross section of employees is receiving these benefits so as to justify the cost.

It was reported that either this fall or early next year hearings will likely be held on the general question of employee benefits. The hearings will probably focus on the value of such benefits to society and the price that should be paid by the Federal government in providing such benefits. There is a possibility that legislation will be introduced to limit either the types and/or the amounts of employee benefits that will be allowed to be provided on a tax-favored basis in the future.

The Committee generally discussed the issue. The Committee was informed that the Group Insurance Committee had also discussed this issue at its last meeting and had agreed to establish a special Task Force to explore the seriousness of the Congressional concern and develop an industry response. The Committee agreed with the Group Committee's approach and authorized the Chairman to establish a group to analyze the problem from the pension perspective.

Parity in the Treatment of IRAs and DECs

A member asked the Committee to consider a proposal it had developed for parity in treatment between IRAs and Deductible Employee Contributions to qualified plans (DECs). The company argued that Congress, in expanding individual retirement accounts and allowing DECs intended to allow maximum flexibility and ease of access for the individual and competitive parity among financial institutions. The Committee was informed that the legislative history

of the Economic Recovery Tax Act indicates that these two retirement savings vehicles were intended to have parity in treatment.

In was pointed out that under present law, IRAs cannot be rolled over into DECs while any portion of the account accumulated in a DEC can be rolled over tax-free into an IRA. In addition, while present law permits spousal IRAs to be established for non-working spouses, spousal DECs are not permitted. Under the pending tax legislation, the maximum deduction a married couple may take for retirement saving through IRAs will greatly increase while such increase will not be available for employees who decide to use the DEC approach. Finally, the proposal to allow non-deductible contributions up to $1,750 to IRAs would not extend to DECs.

During the discussion of this issue, it was pointed out that the Congressional staffs consider this problem to be fairly narrow, and therefore, it has been difficult to get people to focus on it. The Committee agreed that in view of all the other issues currently facing our industry, parity between IRAs and DECs is a low priority item. The Committee agreed to support the concept of parity in principle, but indicated that staff should not spend a significant amount of time dealing with it.

The meeting adjourned at 1:30 p.m.

U.S. Department of Labor Office of Pension and Welfare Benfit Programs
Washington, D.C. 20210

June 1, 1984

Mr. Richard Minck
American Council of Life Insurance
1850 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Minck:

I enjoyed meeting with you and other representatives of the insurance industry to discuss your concerns regarding the treatment under ERISA of insurance company general account contracts and your proposed legislative solutions. I regret that the press of other business has delayed my response to you.

While I can appreciate the problems that were outlined, the Department is not prepared, at this time, to support legislation dealing with these issues. As you may know, some time ago we requested from representatives of members of the industry information regarding the different types of general account products which insurance companies offer, so that we could better understand the situation which you have presented to us. After we receive this information, and we have reviewed it, we would be in a better position to meet with you to discuss how best to handle the issues raised.

I am very hopeful that we can move quickly to a position on this question. We will arrange the necessary meetings after we have reviewed the information you provide.

Again, I enjoyed our meeting and hope we can find some mutually agreeable way of dealing with these issues.

Sincerely,

Robert A.G. Monks
Administrator

Meeting March 5, 1985 Between American Council of Life Insurance and Department of Labor Regarding the ACLI general account Legislative Proposal

Morton Klevan	Department of Labor
Bob Eccles	Department of Labor
Elliot Daniel	Department of Labor
Bill Schmidt	Department of Labor
Jean Leahy	Department of Labor
Steve Kraus	ACLI
Larry Hass	Groom and Nordberg
Ted Groom	Groom and Nordberg
Bill Harman	Davis & Harman
Mel Altman	Equitable
Alan D. Lebowitz	Department of Labor
Stephen H. Goldberg	Aetna Life and Casualty Co.
Jacquie Abbott	Lincoln National Corporation

Steve Goldberg opened the meeting by briefly outlining the events which lead up to the meeting. He referred to the submission by the Council in March 1984 which set forth our legislative proposal together with a detailed memorandum supporting the proposed legislation and the June 1984 response from Mr. Monks, in which the Department of Labor indicated that it was not prepared to comment on our legislative proposal until the Council responded in greater detail, describing our general account contracts and how an insurance company's general account operates. Steve Goldberg reminded the Labor Department representatives that Mr. Monks' letter further indicated that once the Council responded, the Labor Department would work with us quickly to reach a satisfactory resolution of the issue. Steve Goldberg then indicated that the Council, late in 1984, filed a detailed letter with the Labor Department responding to Mr. Monks' requests and that we were here today to answer any questions the Department of Labor representatives had with respect to that letter or the issue generally.

The representatives from the Department of Labor were made aware that resolution of the question of whether an insurance company's general account assets were plan assets is a critical issue to the insurance industry which must be dealt with urgently. A major reason

cited was the uncertainty created by the Peoria Union Stockyards and CBOF cases. We indicated that the need for clarification was further increased by the Labor Department's recent promulgation of the proposed plan asset regulations in that more uncertainty was created as a result of the preamble language which indicated that IB 75-2 would be withdrawn when final regulations dealing with plan assets were promulgated.

Bob Eccles asked whether we could characterize the group annuity market today versus the group annuity market that existed in 1974. We responded that except for GIC's, the products in the group pension market today have not changed significantly from those that were issued in 1974 and before. Bob Eccles asked whether new deposit administration and IPG business is currently being written and we responded that the answer varied depending on the company and the market being serviced.

Morton Klevan then asked whether segmentation was a practice that was being utilized in 1974. We indicated that segmentation was a fairly new development which came into existence during the last 4 years, but that the investment year method did go back to 1974 and that segmentation is just a refinement of the investment year method. We indicated that under segmentation, assets were identified only for investment income allocation purposes and that even if a company was utilizing segmentation to allocate investment income, all assets in the general account still stood behind all general account liabilities.

A question was then raised as to the difference between a contract written from the separate account versus the practice of segmentation in the general account. We indicated that contractholders in the separate account were only entitled to a pro rata return of whatever the assets in the separate account were worth. With regard to general account contracts, even with segmentation, the contractholder was always entitled to something more than a pro rata return on the assets in the segment.

Morton Klevan then asked whether all general account contracts have guarantees of principal and interest. We responded that there were a wide variety of types and levels of guarantees, but that under all general account contracts, principal would not be reduced if it were

left with the insurance company to pay benefits, even if the insurance company experienced adverse investment results. We also indicated that certain withdrawals would not result in a reduction of principal, such as, withdrawals to purchase annuities or installment payout. With regard to market value adjustments, we indicated that the MVA merely measures the difference between the current investment yield and the yield at the time of the investment.

We then made the point to the Department of Labor representatives that focusing on a continuum of contracts does not solve the problem and by doing so, one looses the focus of the nature of an insurance company's general account. We reiterated that the primary business of an insurer is not the investment of capital but rather the assumption of risks and other functions that are not investment related. We indicated that the Labor Department in its proposed plan asset regulations appeared to adopt the rationale that if a plan invested in an operating company, the underlying assets of the operating company were not plan assets. We indicated that has same rule should apply to a plan that invested in an insurance company's general asset account.

A question was then raised about universal life and Bill Harman gave a brief description of how the contract operated. He indicated that it was a flexible premium contract with a cash value equal to the contributions to the policy, less a certain load. He further indicated that a typical universal life contract guaranteed 4% to 5% interest and that most contracts had an excess interest guarantee, which lasted anywhere form 1 to 3 years. Finally, he mentioned that universal life contracts guarantee a maximum mortality charge.

Morton Klevan then offered his understanding of segmentation. He wanted to know whether he was correct in assuming that segmentation was an attempt to make a general account contract look more like a separate account contract when there was favorable investment experience, but protected the policyholder in the event there was unfavorable investment experience. We indicated segmentation was not being used as a marketing took, but merely to allocate investment income within the general account. We also indicated that segmentation was not a universal practice and that different companies had different ways of segmenting their general accounts.

Morton Klevan then asked if it was possible for an insurance company to issue a general account contract that would provide more than the policyholder's participation in a pro rata portion of the investment performance of a particular segment, such that the contract would operate no differently than a separate account contract. We initially indicated that our survey did not reveal that this type of contract was being offered by any insurance company. Secondly, we indicated that it might be disadvantageous or impossible to offer such a product because of tax or state insurance considerations. We indicated further, however, that if this was his primary concern we certainly would be willing to work with him to reflect that concern in our legislative proposal.

Finally, Alan Lebowitz gratuitously offered the comment that the Labor department generally moves very slowly when they are considering an issue on their own. He indicated, however, that the Department responds much more quickly when there is an outside stimulus, i.e. a Congressional request. we indicated that we understood Mr. Leobwitz's point and would be meeting to decide how we could address it.

The meeting ended with a request from the ACLI representatives to meet again within the next 4 weeks. The Department of Labor representatives did not commit to such a meeting.

American Council of Life Insurance

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(202) 862-4191

Stephen W. Kraus
Associate General Counsel

May 17, 1985

TO: GENERAL ACCOUNT LEGISLATIVE STRATEGY GROUP

This is to confirm that the next meeting of your group will be on May 28, 1985. The meeting will be held in the Asian Room of the International Club, 1800 K Street, NW, beginning at 10:00 a.m. The International Club has an entrance on 18th Street between K and Eye Streets and it would be easier if you entered through the 18th Street entrance.

The primary purpose of the meeting is to discuss what action the Council should take in view of the Labor Department's response to our legislative proposal. As you know, the Labor Department has rejected our legislation and has suggested instead that legislation be drafted that would: (1) treat general account contracts similar to any other investment a plan makes so that a determination would have to be made as to whether a plan which purchases a general account contract is purchasing a debt or equity interest; and (2) require insurance companies to disclose to a prospective purchaser the key features of the contract he is interested in purchasing including, among other things, a description of what would happen upon a premature termination of the contract.

It has also been suggested that the Council write to new Secretary of Labor Brock, setting forth our view of the urgent need for legislation and requesting a meeting with him as quickly as possible. You should be prepared to discuss whether the Council should pursue this course of action.

Sincerely,

Stephen W. Kraus

/ha

American Council of Life Insurance

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June 28, 1985

DESCRIPTION OF MODIFIED ERISA LEGISLATION

Background

In February, 1984, the Council's Legislative Committee voted to actively seek legislation which would clarify that an insurance company is not an ERISA fiduciary in connection with the management of its general account assets or the exercise of discretion accorded to it under general account contracts. The need for such clarification stems both from an ambiguity in the current language of ERISA and two 1983 decisions of the Seventh Circuit Court of Appeals which held that an insurance company was a fiduciary with respect to the management of consideration allocated to its general account under a deposit administration contract (Peoria Union Stock Yards Company Retirement Plan vs. Penn Mutual) and that an insurance company was a fiduciary with respect to its exercise of discretion to unilaterally amend a group annuity contract (Chicago Board Options Exchange v. Connecticut General). While these decisions relate to group annuity contracts, their reasoning is equally applicable to other types of contracts issued in connection with employee pension and welfare benefit plans. The severe consequences of the application of ERISA's fiduciary responsibility and prohibited transaction provisions to general account operations were outlined in a position paper prepared in connection with the Council's proposed The Council has been informed by several members of Congress and their staffs that Department of Labor support is critical to the successful enactment of any legislation which would resolve the ERISA status of general account assets and general account operations. Consequently, several meetings have been held by the Council with the Department over the past year (including a meeting in March, 1984 with then Secretary of Labor Donovan), a detailed memorandum was prepared by the Council in December, 1984 for the Department, at its request, describing general account operations and general account contracts, and a letter was recently sent to Secretary

of Labor Brock for Senators Dodd and Nickles urging that the Department work with Congress and representatives of the insurance industry to devise a legislative solution.

Recently, members of the career staff of the Department's Office of Pension and Welfare Benefit Programs have informed industry representatives and members of Senators' Dodd and Nickle's staff that they regard the Council's current legislative proposal as unacceptable. However, they have expressed a willingness to work with the industry and representatives of Congress to develop mutually satisfactory legislation in this area, and have informally outlined the most significant concerns which they believe a legislative proposal must address in order to gain support from the Department.

Summary of DOL Concerns

The Department's staff appears to agree with the industry that as a general rule consideration received by an insurance company under general account contracts should be excluded from "plan asset" status, and that an insurance company's exercise of discretion accorded to it under a general account contract should be excluded from ERISA's fiduciary responsibility provisions. However, unlike the Council's current legislative proposal, the staff has expressed the position that exceptions to the general exclusion from "plan asset" status need to be made in the case of non-traditional contracts which are essentially indistinguishable from non-guaranteed separate account arrangements, and in the case of companies that are not undertaking real insurance risks as a substantial part of their business. While the staff has not made this point explicit, it would appear that the exceptions which they have in mind would not be applicable to most forms of current annuity, health, life insurance and guaranteed interest contract arrangements which contain at least some form of minimum guarantee of investment performance (i.e., guarantees of principal or interest, or guarantees that benefits will not be reduced as a result of adverse investment experience) or to companies, a majority of whose business is comprised of contracts involving such minimum guarantees. The Department's staff also has expressed a serious concern that any broad exemption of insurance company general account operations from ERISA should not leave employee benefit plans without a federal right to seek consequential damages in the event of an insurance company's commission of fraud or an insurance company's abuse of its discretion to unilaterally amend or otherwise modify the provisions of its contracts. Additionally, the staff has implied that its willingness to support a broad based exclusion of general account assets from "plan assets" status might be conditioned upon the application of a prudence standard to an insurance company's investment of consideration under a general account to the extent that the contractholder participates in the company's investment experience. The staff has acknowledged that any new federal standards governing discretionary contractual amendments and general account investments, unlike ERISA's exclusive benefit rule, would have to take into account an insurance company's obligations to its non-employee benefit plan contractholders and its other reasonable business objectives.

Description of Modified Legislative Proposal

The attached outline has been drafted by an ad hoc working group of the Council's Task Force on Fiduciary Matters in an effort to determine whether a legislative approach could be developed which is both generally responsive to the concerns of the Department's staff and acceptable to the industry. As noted above, meetings which have been held to date with representatives of Congress and their staffs indicate that an effort to address the Department of Labor's legitimate concerns will be an essential element for developing and maintaining Congressional support for the industry's legislative initiative.

The modified legislative proposal which is described in detail in the attached outline is intended generally to address the concerns expressed by the Department's staff, but on a basis most consistent with the industry's primary objectives and concerns. It should be emphasized, however, that this proposal has not been reviewed with the Department's staff and that there is no certainty that the staff, or the policymakers of the Department, or the members of Congress or their staff would find all or material parts of this proposal to be acceptable. The proposal includes the following primary features:

> A general rule which provides that the general account assets of an insurance company are not plan assets and that an insurance company is not a fiduciary with respect to the

exercise of discretion accorded to it under general account contracts.

Exceptions to the general rule for contracts lacking minimum investment guarantees and for companies, a majority of whose general account business is comprised of contracts falling under the exception [This exception is intended to apply only to contracts where the amounts and benefits payable under such contracts are determined solely with reference to the insurance company's investment experience and is not intended to apply to current forms of general account annuity, life insurance and health insurance contracts containing at least minimum investment guarantees, including IPG contracts and universal life].

An anti-fraud provision (patterned after SEC Rule 10b-5) applicable to material misrepresentations and omissions made in connection with the solicitation of consideration under a general account contract. [This provision is not intended to apply to any contract subject to the anti-fraud provisions of the federal securities law or to contracts which do not contain significant investment participation features (e.g., traditional life and health insurance contracts, guaranteed interest contracts without provisions for excess interest)].

A provision creating a federal remedy for damages resulting from an insurance company's unilateral amendment or modification of a contract on an arbitrary and capricious basis. [The "arbitrary and capricious" standard would take into account the insurance company's reasonable business objectives, obligations to other contractholders and applicable state insurance law requirements. Further, no action could be brought where an amendment or modification applies only prospectively to new consideration received after the amendment or where the contractholder is afforded the right to terminate or discontinue the contract on a book value lump sum or installment basis].

A provision which applies a prudence standard to the investment of consideration received under a general account contract. [This standard would not apply to the consideration received under a contract to the extent that amounts or benefits are guaranteed under the contract (e.g. it would not apply to the investment of consideration under a guaranteed interest contract). Further, the prudence standard would be satisfied if, in investing the consideration received under a contract, the insurance company (taking into account the other obligations which its investments support, its corporate objectives, and applicable state insurance law requirements) gives appropriate consideration to its obligations under the contract].

Application of the exception from the general exclusion from ERISA and application of the new anti-fraud, contract amendment and prudence provisions only to contracts issued after the effective date of the legislation; and a provision which would preclude any clause of action being brought against an insurance company on the grounds that the insurance company was a fiduciary by virtue of its management of general account assets or its exercise of discretion under general account contracts prior to the enactment of the legislation.

In summary, the modified legislative approach, like the Council's current legislative proposal, would provide for a general exclusion of general account operations from ERISA's fiduciary responsibility and prohibited transaction provisions in the future and for broad immunity from litigation for alleged breaches of fiduciary duty in the past. However, in an effort to address the concerns of the Department's staff, it would create a limited exception to the general ERISA exclusion on a prospective basis, and would create federal remedies on a prospective basis for violations of certain standards of conduct that are intended to be compatible with how insurance companies now conduct their general account operations.

MINUTES OF THE MEETING OF
THE PENSION COMMITTEE HELD AT
THE COUNCIL'S OFFICES, WASHINGTON, D. C.,
October 9, 1985

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The following members were present:

Jack Naughton, Chairman	Elliott Kassenoff
Herbert Boothroyd	David J. McDonald
Yuan Chang	William C. Prouty
William Cunningham	Russell H. Smith, Jr.
William Gould	Henry N. Winslow
Tom Hughes	Anne Rodier

Others present during all or part of the meeting were as follows:

Mel Altman, Equitable
Jacquie Abbott, Lincoln National
Michal L. Bobryk, Home Life
John Booth, ACLI
Wallace Campbell, State Mutual
Peter Connell, Aetna Life & Casualty
Phyllis Gerstell, ACLI
Steve Goldberg, Aetna Life & Casualty
Bill Gibb, ACLI
Ken Cohen, Massachusetts Mutual
John Hicinbothem, New England Life
Steve Kraus, ACLI
Lawrence J. Hass, Groom & Nordberg
David Levy, O'Neill & Haase
Ken Meuser, Meuser Associates
Gordon J. Munro, New York Life
Michael M. Oleske, Metropolitan Life
Ron Powell, IDS Life
Mike Romig, ACLI
Steve Sacher, Pepper, Hamilton & Scheetz
John Schmidt, Bankers Life
Thomas F. Shea, CIGNA Corporation
Tony Spano, ACLI
Tony Valanzano, ACLI

Chairman Naughton began the meeting at 10:00 a.m. The first item on the agenda was a report, given by Steve Goldberg, Chairman of the Pension Committee's Fiduciary Task Force, on the progress of efforts to seek legislative clarification of the fiduciary status of insurance companies in connection with general account operations.

General Account Legislation

Mr. Goldberg reported that, at its last meeting, the Pension Committee had authorized staff to go forward with the development of modified general account legislation. As modified, the legislation would have provided prospective relief from the ERISA fiduciary provisions for general account assets and contracts, but, at the same time, would have provided federal remedies and a statutory investment standard as protection for plan participants. Mr. Goldberg further reported that the legislation would also contain a provision that would preclude any causes of action from being brought against an insurance company on the grounds that the company was a fiduciary by virtue of the management of its general account assets or its exercise of discretion under general account contracts prior to the enactment of the legislation.

While work was proceeding on this legislation, word was received from Senators Dodd and Nickles' staff that the House/Senate Budget Reconciliation Bill would be used as a vehicle for ERISA legislation. The Senators further indicated that they would support the ACLI efforts to attach the general account legislation on the Budget Bill provided the ACLI could secure Department of Labor backing. Mr. Goldberg then reported on a meeting held shortly thereafter with the Labor Department. At this meeting, concern was expressed by the Labor representatives with regard to both the grandfathering provision in the ACLI bill and the notion that all contracts that merely provided principal guarantees would no longer be subject to ERISA's fiduciary standards. The Department, further, indicated that the Budget Bill would not become an ERISA vehicle. At the conclusion of the meeting, however, the Department said it would try to get back to the ACLI with further thoughts on both of these issues.

The Committee was informed that, contrary to the impression created at the meeting, the the real estate syndicators were able to get

an amendment on the Budget Reconciliation Bill specifying that, until the issuance of final DOL regulations, Interpretive Bulletin 75-2 would continue to apply to real estate publicly offered partnerships. The Committee was further informed that, as a result of the syndicators' success, the DOL had sent a similar transitional rule that would provide that I.B. 75-2 would continue to apply to insurance contracts until 90 days after the effective date of any regulations dealing with general account issues. After negotiations with the DOL, one exact language of the Bill and legislative history were agreed to by both the DOL and the industry. Mr. Goldberg pointed out that this transitional legislation would not directly deal with the CBOE issue (i.e., the question of whether insurance companies are fiduciaries if they unilaterally exercise the right to amend a contract). On the other hand, the transitional rule would not contain the trade-offs provided for in the comprehensive ACLI Bill, i.e., federal remedies, and an investment standard.

It was reported that as staff was attempting to generate support for the amendment, Senator Metzenbaum objected on the grounds that the industry was attempting, by this legislation, to overturn the Peoria Union decision. It was further reported that, despite attempts, the industry was unable to convince Senator Metzenbaum to change his position and, as a result, efforts to have the transitional rule added to the Budget Reconciliation Bill were unsuccessful. The opportunity does, however, exist, to have this provision added when the Budget Bill goes into conference, and the Committee next considered whether this should be attempted. It was noted that, if the Council were successful in the effort to have the transitional rule added, it would probably be extremely difficult to pursue another more comprehensive legislative solution in the near future. On the other hand, the pressing need for some legislative protection in this area was an important fact to consider.

In discussion, it was pointed out that the transitional legislation would have two helpful attributes: (1) it would enable companies to rely on the more helpful legislative history of I.B. 75-2 (which took account of, for example, IPG Contracts); and (2) it would redirect the focus of the definitional inquiry from the term "guaranteed benefit policy" to "contract or policy of insurance". It was further pointed out

that, if I.B. 75-2 were codified with regard to real estate, any silence with regard to insurance companies would likely raise a negative inference which would be extremely harmful in future litigation. On the other hand, it was noted that the transitional rule would not address the CBOE issue and that silence in this area could create an even more damaging negative inference.

To counteract potential problems in this area, it was suggested that Conference Report language accompanying the temporary rule indicate that it was not dispositive of the overall general account issue, and that the Department of Labor would be studying the question further. It was further suggested that if the temporary legislation was not attached to the Budget Reconciliation measure, it would be imperative that any Conference Report language to the real estate industry's bill indicate that no negative inference should be drawn regarding insurance companies. Finally, the point was made that time was of the essence on this issue.

In view of all these considerations, the Pension Committee voted unanimously in favor of the Council attempting to amend the Budget Reconciliation Bill to codify the status of I.B. 75-2 with regard to life insurance company general asset accounts. It was understood that, even if the industry were successful in achieving enactment of this temporary legislation, efforts to secure enactment of the broader general account legislation would continue.

Section 401(k) Survey Results

Hillel Raskas of the ACLI's Social Research Department Staff reported on the results of a survey asking Pension Committee members to assess the relative amount of disruption to their business created by the various proposals is the Administration's tax reform package affecting Section 401(k) plans. The Committee was asked to rank the proposals into three categories: (1) most disruptive; (2) some disruption; and (3) least disruptive. The items viewed as most disruptive were: (1) restrictions on distributions from 401(k) plans; (2) modification of the 401(k) actual deferral percentage ("ADP test"); and (3) elimination of the preferential tax treatment of lump sum distributions.

It was reported that since the survey was mailed, the Joint Committee on Taxation had issued an option paper for consideration by the Ways and Means Committee dealing with the various pension proposals. With regard to 401(k) plans the option paper would replace the $8,000 maximum allowable deferral in the Administration's proposal, with an unindexed $5,000 maximum deferral amount which would be integrated with any IRA. The option paper would, in addition, replace the individual deferral rate for the highly-compensated under the Administration's proposal with an averaging test; however, the definition of the highly-compensated would be narrowed and a single percentage limit test (125% of average deferral of non-highly paid) would apply to the highly paid. No withdrawals would be allowed from 401(k) plans and changes in the loan rules would deny an interest deduction for any loans attributable to elective contributions.

As a result of the changes embodied in the Joint Taxation Committee option paper, the Pension Committee decided to move two of the questionnaire items to Category 1 (most disruptive) status: Item 8 (limiting the per participant Section 401(k) elective contributions) and Item 5 (modifying the 401(k) ADP test). The Committee also agreed to lower to Category 3 (least disruptive), questionnaire Item 9 (integration of Section 401(k) and IRA contributions).

Finally, staff noted that, with regard to Section 401(k) — as well as other employee benefit issues — the ACLI was a participant in a broader coalition on whose behalf Congressman Beryl Anthony (D-ARK) was planning to offer an amendment regarding Section 401(k) plans. In general, this amendment would retain current law treatment of such plans but place a cap on contributions of $12,000. It was also reported that a resolution had been introduced, sponsored by Congressman Hawkins (D-CAL) and co-sponsored by more than 150 members of the House, that expresses the sense of the House that the tax reform bill should not tax employee benefits. It was noted that the resolution deals with employee benefits generally, and does not specifically mention 401(k) plans. The Committee was asked to contact plan sponsors and urge them to write their Congressmen to support the Hawkins resolution.

<u>Tax Reform</u>

Staff reported on some of the other proposals contained in the Joint Taxation Committee Staff option papers.

With regard to <u>403(b) annuities</u>, staff noted that many significant changes had been made, designed to bring 403(b) annuities within the 401(k) rules. On 403(b) issues, it was also noted that a Task Force of the Legislative Strategy Group had been formed to deal specifically with this area. With regard to <u>lump sum</u> distributions, the Joint Taxation Committee option would: (1) replace ten year averaging with five year averaging; (2) eliminate averaging for distributions before age 59½; and (3) apply a 15% penalty to all annual distributions in excess of $93,750. Other distribution rules would reverse the current ordering rule for partial withdrawals, and would apply a 15% penalty to all early withdrawals before age 59½. <u>Section 415</u> limits would be further narrowed; and finally, <u>general non-discrimination</u> rules would be applied to pension and welfare benefit plans. These rules would: (1) impose a uniform mechanical 90% eligibility test; (2) eliminate the "reasonable classification test"; and (3) allow a limited "line of business" or "operating unit" exception from the 90% rule. The Committee was informed that lobbying papers were being prepared for all these issues and that the Council was actively lobbying against all the proposals and keep current law.

<u>Other Issues</u>

A report was given on the Council's October 1, 1985, testimony on the pension policy implications of the President's tax reform proposals on benefit programs and retirement savings before the Labor Subcommittee of the Senate Labor and Human Resources Committee. It was noted that two items were emphasized in the oral testimony given by Pension Committee Chairman John Naughton: (1) that retirement issues are not an appropriate subject for resolution in a tax bill and therefore should be removed; and (2) our principal objections to the Section 401(k) proposal. It was noted that no questions had been asked regarding tax revenues; however Mr. Naughton had been asked how many Section 401(k) arrangements represented new plans, rather than old plan conversions. The question of whether the industry preferred a floor or cap on health benefits was

also asked; on this point the ACLI reply was that the industry was opposed to both proposals.

It was next noted that a member of the Committee was filing a private letter ruling request regarding the status of the P.S. 58 cost basis when a whole life contract is surrendered and transferred to a universal life contract in a qualified plan. According to at least one general information letter sent by the IRS at the request of a taxpayer, it would appear that there is no carryover of the P.S. 58 basis when a whole life contract is surrendered and its cash value is incorporated into or used to pay a single premium for a universal life policy. (It was subsequently heard that the private letter ruling request had been withdrawn when the IRS indicated that it planned to issue an adverse ruling.)

A further item raised was the question of what position the ACLI might take on proposed legislation dealing with plan asset reversions. Legislation proposed by Senator Metzenbaum and incorporated in the Budget Reconciliation Bill would impose a moratorium until March 1, 1986, on all plan asset reversions and would mandate a Labor Department study of this issue, to be completed by February of 1986. It was noted that the APPWP and ERIC were actively opposing this amendment. The question was raised as to: (1) whether the ACLI was sufficiently interested in this issue to get involved; and (2) if so, what the ACLI position should be — particularly in light of attempts to have the industry's general account stopgap legislation added onto this same Budget Bill. In discussion it was suggested that it would not be politically feasible to oppose the asset reversion provision, and, at the same time, urge adoption of our general account provision — particularly since APPWP and ERIC were opposing asset reversion legislation on the ground that budget reconciliation was not the appropriate place for ERISA legislation. The Committee agreed that the ACLI should not oppose the asset reversion provisions in the Budget Reconciliation Bill.

<u>Joint LICONY/ACLI Task Force on the Regulation of Group Annuity Contracts</u>

Mel Altman summarized the status of discussions with the New York Insurance Department on the industry draft regulation, which

provides disclosure rules for group annuity contracts and rules requiring certain participant benefit withdrawals under contracts issued in connection with defined contribution plans to be made without market value adjustment. He noted that there was nothing new to report on the book value portion of the regulation. With regard to disclosure, Mr. Altman reported that the industry had agreed to provide disclosure to not only the plan sponsor but the contractholder as well. With regard to old contracts, although these contracts would be grandfathered under the industry proposal, the issue of how to treat new employees coming under old plans would need to be addressed. On the question of whether the contract could itself serve as a disclosure document, the New York Department had indicated that this would be permissible so long as key items were not "buried" in the contract. Finally, it was noted that, while the initial industry strategy had been to finalize the disclosure and book value issues before going forward with the issue of regulation of market value adjustments, this has now been changed somewhat, and discussions on market value adjustment issues will be pursued so that these issues can be resolved in the context of the disclosure regulation — rather than in the context of a regulation being developed by another group regarding market value adjustments and non-forfeiture values.

The meeting adjourned at 1:00.

PENSION COMMITTEE
1985

(150)

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(***)

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MINUTES FOR THE PENSION COMMITTEE MEETING
MARCH 4, 1986

MINUTES FOR THE PENSION COMMITTEE MEETING
MARCH 4, 1986

The following persons attended:

Jack Naughton, Chairman, Mass Mutual
John Booth, ACLI
Jim Brock, Nationwide
Wally Campbell, State Mutual
Bill Cassidy, National Life of Vermont
Stephen Chiumenti, New England Life
Ken Cohen, Mass Mutual
Gil Cronin, Transamerican Life & Annuity
Dale Denno, Union Mutual
Bill Gould, Bankers Life
Phyllis Gerstell, ACLI
Larry Hershberger, TIAA-CREF
Lynn Jacobs, CIGNA
Jack Joyce, State Mutual
Melissa Kahn, Equitable
David Kalib, Berkshire Life
Lya Kilian, New York Life
Steve Kraus, ACLI
Curt Krause, The Travelers
Dave Levy, O'Neill & Haas
Maureen Mullen, Aetna
Ron Powell, IDS Life
Alan Reed, Lincoln National
Gail Rosenstock, Mutual Benefit Life
John Schmidt, Bankers Life
Tony Spano, ACLI
Gerry Talbot, Metropolitan
Mark Williams, Phoenix Mutual
Henry Winslow, John Hancock

Chairman Naughton opened the meeting at 10:00 a.m. The discussion and action taken by the Pension Committee on the various agenda items considered are set forth below.

Use of Participating Annuities in the
Termination of Over-funded Plans.

Staff provided the Committee with a background summary of this issue. On May 31, 1985, the National Office of the IRS issued a letter to all Assistant Regional Commissioners which indicated that a study had been initiated on the effect on plan qualification status of the use of participating annuity contracts in plan terminations. The letter further noted that, pending release of the study, the issuance of determination letters would be suspended. It was further reported that Congressman Edward Roybal (D-CA) had sent letters to the Internal Revenue Service, Department of Labor and Pension Benefit Guaranty Corporation, requesting that: (1) the PBGC withdraw its opinion letter 85-9 approving the use of participating annuities in connection with over-funded pension plan terminations; and (2) the Department of Labor undertake an expeditious examination of issues relating to the use of such contracts, including any fiduciary and prohibited transaction implications.

To respond to these developments, ACLI staff and member company representatives met, in early January, with individuals from the Internal Revenue Service and Labor Department at two separate meetings to discuss the industry's position on the use of participating annuities in terminating plans. The meeting with the Labor Department was viewed as encouraging, particularly in that representatives of the Department saw no particular fiduciary, plan asset or prohibited transaction problems arising from the use of these contracts. The Department's only expressed concern was with regard to possible manipulation of assets from the ongoing plan by the employer so as to avoid hitting the contractually specified "trigger point" (the level of funds under the participating annuity contract at which annuities would need to be purchased for participants in the terminated plan).

The IRS meeting was viewed as somewhat less successful. Representatives from the Service expressed a variety of concerns with regard to the tax (rather than the employee benefits) aspects of these arrangements. Among the questions raised by the IRS were: 1) is this type of participating annuity a true annuity? 2) are wrap-around annuity issues involved in this context? 3) since amounts in excess

of those needed to purchase a "traditional annuity" go into these contracts, should the contract be split into two parts, with amounts in excess of those needed to purchase a traditional annuity subject to current tax? 4) is there a "segregated asset account" as defined under DEFRA? Underlying all these questions was the concern that employers have the ability to avoid paying current tax on the distribution of amounts in excess of the purchase price of the annuities by putting these excess amounts into the contract, and then gaining access to these funds in the form of dividends from the contract.

The Committee discussed whether any further ACLI action was advisable. For example, it was suggested that the ACLI might prepare a legal memorandum as to how these arrangements should be treated for tax purposes. On the other hand, in light of the wide range of products used in the participating annuity market, it was the consensus of the group that further action would not be warranted at the present time. The Pension Committee, accordingly, agreed that the Council should not take any additional action at present with regard to the use of participating annuities in terminated plans, with the understanding that the item could be re-examined, if need be, at the Committee's next meeting.

Privatization of the Pension Benefit Guaranty Corporation.

Staff reported that the Reagan administration has been interested in developing proposals to reduce the role of the federal government in insuring private pension benefits. As part of this effort, the question has been raised as to whether private insurance companies would have an incentive to take over the Federal role in providing such insurance if an appropriate premium could be developed. In discussion, doubt was expressed as to whether it would be possible to pursue this market with any acceptable degree of risk. Thus, in light of the lack of current interest in providing such a product, the Pension Committee agreed to take no action on this question at the present time. It was understood that ACLI staff would continue to monitor this issue, however, and that, should the GAO or other government-sponsored Task Force or Agency produce a report or study on this topic, the Committee would reconsider its position.

Arbitrage Borrowing by State and Local Governments.

A background report was given on this issue. It was noted that under current law, interest on obligations issued by a state or any political subdivision of a state is generally tax-exempt. Interest on an otherwise tax-exempt obligation, however, is taxable if the obligation is an "arbitrage bond" (i.e., an obligation that is part of an issue more than 15% of the proceeds of which are reasonably expected to be used to acquire taxable obligations that produce a materially higher yield than the yield on the tax-exempt obligation). Under current law, borrowing by state and local governments for the purpose of purchasing annuities from life insurers to fund public pension past service liabilities on retired lives is not considered "arbitrage."

The House-passed Tax Reform Bill (H.R. 3838) makes numerous amendments to the general arbitrage restrictions applicable to all tax-exempt bonds. In particular, the Bill provides restrictions on the types of obligations in which bond proceeds may be invested without regard to yield restrictions. Thus, under the Bill, investment in any deferred payment contract (including an annuity) is precluded if the yield on the contract is materially higher than the yield on the bonds. The Committee Report language to the Bill indicates that the purchase of an annuity contract to fund a pension plan of a qualified governmental unit would be subject to the same arbitrage restrictions as would direct funding of that plan with bond proceeds.

In discussion of what action the Council should take with regard to the H.R. 3838 arbitrage provision, the point was made that in two recent private letter rulings, the Service had found no arbitrage where tax exempt proceeds were used to purchase single premium non-participating insurance contracts. These rulings were premised on the theory that, since the political subdivision cannot use the investment yield, there is no rationale for finding that arbitrage has occurred. Thus, the point was made that perhaps it would be sufficient to seek inclusion of language in the Committee Report to the Bill indicating that the underlying arbitrage provision was not intended to overrule the favorable private letter rulings with regard to purchase of single premium non-participating insurance contracts.

In discussion, concern was expressed as to the strategic ramifications of addressing this aspect of H.R. 3838 without considering the industry's overall legislative priorities. On this point, the Committee was reminded by staff that any position taken by the Pension Committee on a tax reform issue would need to be referred for ultimate approval to the Joint ACLI/HIAA Steering Committee on the Taxation of Employee Benefits, Individual Life Insurance, and Related Issues. Finally, the suggestion was made that, in light of the lack of clarity as to whether the H.R. 3838 provision was meant to distinguish between so-called "real" annuities and "investment annuities" (i.e., guaranteed interest contracts or GIC's), it was not possible to fully ascertain the severity of any potential problems. Accordingly, the Pension Committee agreed that as a first step before taking any further action on this issue, staff would attempt to see if the arbitrage borrowing provision in H.R. 3838 was intended to apply only to GIC's.

Internal Revenue Service Notice 86-3.

Staff reported son recently issued Internal Revenue Service Notice 86-3. This Notice purports to grant partial relief for certain qualified plans that were not timely amended and filed to comply with the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), the Deficit Reduction Act of 1984 (DEFRA) or the Retirement Equity Act of 1984 (REA). The Notice imposes a partial loss of employer deductions for plan contributions and a partial taxation of key employee benefits. The negative tax consequence increase with each month the plan is filed late for a determination letter ruling.

The procedures set forth in Notice 86-3 will apply to employers who had received favorable determination letters for their plans and to employers who had, on or before March 19, 1984, adopted a master or prototype plan for which a favorable post-ERISA opinion letter had been issued. The procedure will apply where such plans were not timely amended to comply with TEFRA, DEFRA or REA (and for which determination letters, as necessary for reliance, were not requested) by the applicable compliance date for each statute.

In discussion of the Notice, three points were made. First, employers need additional time to file without penalty. Second,

special consideration needs to be given to employers who adopted filed, (but as yet unapproved), master or prototype plans after March 18, 1984. Third, it was unfair to base the granting of hardship relief on the filing of a determination letter. The Committee therefore agreed that the ACLI should protest the requirement that, to qualify as a "prior adopter", the plan would have to have filed for a determination letter. Staff was requested to request relief from the Notice.

General Account Contracts.

Staff reported on the progress of the Council's legislative and regulatory efforts to clarify the status of ERISA's fiduciary responsibility and prohibited transaction rules with regard to insurance company general account contracts and assets. It was noted that, late last year, real estate syndicators had been successful in inserting a provision in the Budget Reconciliation Bill clarifying that IB 75-2 would continue to apply to them in the absence of further regulatory guidance. To respond to this development, the ACLI sought to have a similar legislative provision inserted in the bill to cover life insurance company general account contracts and assets. When this effort failed, the Council then sought to insert Conference Report language to the Budget Bill clarifying that no negative inference should be drawn with regard to life insurance company general account assets and contracts from the syndicators' provision. The ACLI was successful in this later effort, and the Budget Reconciliation Bill -- including our Conference Report language -- was signed into law by the President on April 7, 1986. The Fiduciary Task Force then discussed the question of how to proceed with the comprehensive general account legislative proposal developed by the group last year. In light of the resistance of the Labor Department to this proposal, it was determined that the legislation was too complicated to be enacted. Therefore, the Task Force recommended that the legislation be placed on hold, and that work, instead, should focus on developing an acceptable life insurance contract "safe harbor" for inclusion in plan asset regulations to be developed by the Department of Labor or legislation if the opportunity presents itself.

New York Insurance Department.

It was reported that a joint ACLI/LICONY Task Force has been working with the New York Insurance Department in developing regulations on three issues with regard to group annuity contracts. The group is near completion with regard to discussion drafts on two items, i.e., 1) appropriate policyholder disclosure rules; and 2) rules as to when book value payments must be made under defined contribution contracts. The group has not proceeded as far with the Department on a third, more controversial topic — that is, the question of when market value adjustments may be made under group contracts. In summarizing the activities of the group, it was stressed that the joint Task Force at present is preparing discussion documents only, and that they will not proceed with any final submission until they have sought formal approval by both LICONY and the ACLI — including the Pension Committee.

REA Hearings.

A report was given on the ACLI's testimony at hearings held by the IRS on the proposed REA regulations. Two of the issues focused on by the Council generated rather hostile questions from the government panel; in particular, opposition was voiced to the ACLI concept that, if a deferred annuity is distributed by a qualified plan to a participant, REA's anti-cutback, survivor benefit, and spousal waiver requirements should not "live on" in their entirety in the new annuity contract. While the ACLI conceded that some of REA's rules should continue to apply in this context, it was the ACLI view that a blanket extension of REA's provision would go way beyond the statute and its legislative history. Moreover, the point was made that if this position were adhered to, insurance companies would be unable to offer these products. Despite these arguments, the view was expressed by the government panel that the Service would not accept the industry's position and that the final regulations would probably come out with this provision intact.

A second point raised in the ACLI testimony draft with the inconsistency in the treatment in the regulations of QPSA ("Qualified Pre-Retirement Survivor Annuity") death benefits. Under the regulations, it would appear that the QPSA for a defined benefit plan must

be based on the participant's account balance before the date of death (i.e., without life insurance proceeds). By contrast, for defined contribution plans, the QPSA would be based on the account balance of the participant on the day after death — that is, including life insurance proceeds. In discussion, the government panel indicated that this provision of the regulation would not be changed.

In general, the overall impression conveyed at the hearings was that the service was very intent on finalizing the REA regulations as they were proposed, and that it is unlikely that there will be any significant change in the regulations of interest to the ACLI.

Retirement Income Policy.

The Pension Committee concluded the meeting with a discussion of possible positions to be taken by the ACLI on specific retirement income issues. A springboard for discussion was the Retirement Income Policy Act of 1985 (RIPA) which had been the subject of recent hearings in Congress, and which was expected to be incorporated in some part by the Senate Finance Committee during its mark-up of a tax reform bill.

Limits on Contributions, Benefits and Elective Contributions

The Pension Committee agreed that RIPA's approach of linking the Section 415 and Section 401(k) limits to the Social Security taxable wage base was desirable. The Committee did not, however, agree with the specific benefit/contribution levels contained in RIPA — particularly the reduced dollar limits for defined contribution plans and Section 401(k) plans. As an alternative, the following was suggested:

1) Defined benefit plans — the lesser of 100% of compensation or 200% of the Social Security taxable wage base ($84,000 for 1986);

2) Defined contributions plans — the lesser of 25% of compensation or 50% of the Social Security taxable wage base with a minimum dollar limit floor of $25,000.

3) Elective contributions to 401(k) plans — a dollar limit equal to 25% of the Social Security taxable wage base ($10,500 for 1986),

but with a transitional floor dollar limit of $15,000. The special RIPA limit for nonretirement plans (i.e., thrift and profit-sharing plans) would be deleted.

Retirement/Nonretirement Plans

The Pension Committee rejected the retirement/nonretirement plan distinction which is the core concept of RIPA. The Committee felt that the concerns of RIPA's sponsors as to potential diversion of retirement benefits for nonretirement purposes could be better addressed via appropriate withdrawal rules.

Withdrawals

The Pension Committee suggested a two-tier approach to hardship withdrawals. The first tier of withdrawals would be triggered by unanticipated events such as: 1) major, uninsured medical expenses; 2) long-term disability; and 3) involuntary unemployment followed exhaustion of any unemployment compensation benefits. Withdrawals for this category of hardships would not be subject to any excise or recapture tax contained in the tax reform proposals.

The second tier of hardship withdrawals would include college tuition payments or the purchase of a principal residence. Second tier hardships would be permitted, but would be subject to a tax which would recapture the tax advantages of income deferral under a qualified plan. If it were found that an appropriate recapture tax could not be designed, the Committee would consider a reasonable flat percentage excise tax.

The Committee was of the opinion that in-service withdrawals by active employees and cash-outs on separation from service should continue to be permitted, as under current law, from profit-sharing, thrift and savings plans without additional tax. However, the Committee agreed that some political concession to discourage diversion of retirement benefits for preretirement purposes might be necessary. (The approach taken under the House passed tax bill, H.R. 3838, to accomplish this end is to impose a 15% excise tax on the taxable amount of distributions made prior to age 59½.)

The Committee agreed that a recapture or excise tax was preferable to a flat prohibition on withdrawals. In the Committee's view, such a flat prohibition would greatly discourage participation in contributory arrangements which would, in turn, diminish coverage under private retirement plans. The Committee suggested that, at the very least, the age 59½ cut-off point for distributions that would be free of excise tax should be lowered to age 55 to take account of common early retirement practice. For distributions prior to age 55, it was agreed that it there must be some tax, the ACLI should seek a recapture tax or, in the alternative, a flat percentage lower than 15%.

As to the treatment of lump sum distributions, the Pension Committee agreed to accept the 5-year averaging proposal in H.R. 3838 — with the reservation that the age 59½ minimum age be lowered to age 55.

Finally, the Pension Committee agreed that it was extremely important to seek to retain the current law FIFO ordering rules on withdrawals prior to the annuity starting date. (The House passed tax bill would reverse the ordering rules and treat the first money coming out of a thrift plan as untaxed earnings.) A pro rata approach was suggested as a possible compromise. However, concern was expressed that such an approach would be complex to administer.

Vesting

The Pension Committee agreed that some form of more rapid vesting could be supported, although several problems were raised with the 5 year/100% vesting proposed in RIPA.

Integration with Social Security

The Pension Committee agreed that further changes in the rules regarding integration with Social Security along the lines of the RIPA proposals were acceptable. The Committee noted, however, that the Social Security offset proposal could result in lower-paid employees receiving a combined retirement benefit in excess of 100% of final compensation and excessive aggregate benefits for middle-level employees. To correct this problem an upward adjustment in the offset formula or a cap on aggregate benefits would be needed.

<u>Coverage</u>

The Pension Committee agreed that, absent demonstration of abuse, the current law coverage tests should be retained. However, the Committee further agreed that if it were demonstrated that significant abuse was occurring under the current law rules, some tightening of the current law percentage tests would be considered. In any event, it would be important to seek retention of an alternative, "fair cross section", test as under current law.

The meeting adjourned at 1:30 p.m.